In the
Supreme Court of the United States.

OCTOBER TERM, 1979.

NO. 79-61

TOWN OF MASHPEE, ET AL.,
PETITIONERS,

v.

MASHPEE TRIBE,
RESPONDENT.

Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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v.

MASHPEE TRIBE,
RESPONDENT.

Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

The petitioners Town of Mashpee, Maurice A. Cooper, John D. Ferguson, Mary Jane Shoop, Matthew B. Connolly, Jr., New Bedford Gas & Edison Light Company, New Seabury Corporation, New Seabury Conveyancing Corporation, Fields Point Manufacturing Corporation, Greenwood Development Corporation and Russell Makepeace, et al., General Partners d/b/a Wiljoles Lands, a Massachusetts Limited Partnership, individually and as representatives of the class of defendants certified below, respectfully pray that in the event the Supreme Court of the United States issues a writ of certiorari upon a petition by the Mashpee Tribe to review the

judgment and opinion of the United States Court of Appeals for the First Circuit entered on February 13, 1979, in *Mashpee Tribe* v. *New Seabury Corp., et al.*, a writ of certiorari also issue to review that portion of the judgment and opinion described herein.

Opinions Below.

The opinion of the United States Court of Appeals for the First Circuit in *Mashpee Tribe* v. *New Seabury Corp., et al.*, is reported at 592 F. 2d 575 and the opinion of the United States District Court for the District of Massachusetts in that case is reported at 447 F. Supp. 940. The slip opinions from each court are reproduced in the Appendix hereto.

Jurisdiction.

The judgment of the Court of Appeals for the First Circuit was entered on February 13, 1979. An order extending time to file petition for writ of certiorari until July 13, 1979, was granted to petitioners on May 8, 1979. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

1. Whether the provisions of the several Trade and Intercourse Acts passed between 1793 and 1834 regulating transactions in Indian lands were limited in their application by con-

temporaneously enacted provisions eschewing federal regulation of any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual states.

2. Whether, in particular, § 19 of a statute entitled "An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers," Act of March 30, 1802, ch. 13, 2 Stat. 139 *et seq.* (hereinafter the "1802 Trade and Intercourse Act"), exempted from federal regulation any trade and intercourse, including the alienation of Indian tribal land, with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual states.

3. Whether the exception from federal regulation of any trade or intercourse with certain Indians, as set forth in § 19 of the 1802 Trade and Intercourse Act, continued in effect for Indian tribes living east of the Mississippi after the passage of the Act of June 30, 1834, ch. 161, 4 Stat. 729 *et seq.* (hereinafter the "1834 Trade and Intercourse Act"), by virtue of § 29 of that Act.[1]

Statutory Provisions Involved.

UNITED STATES CODE, TITLE 25.

§ 177. No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian

[1] In 1875, Congress codified certain provisions of law deemed to be of permanent importance into the Revised Statutes. Certain provisions of the 1834 Trade and Intercourse Act were included in the Revised Statutes; § 29 of the 1834 Trade and Intercourse Act was not.

nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. . . .

1802 TRADE AND INTERCOURSE ACT.

§ 12. *And be it further enacted*, That no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian, or nation, or tribe of Indians, within the bounds of the United States, shall be of any validity, in law or equity, unless the same be made by treaty or convention, entered into pursuant to the constitution: . . .

§ 19. *And be it further enacted*, That nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual states; . . .

1834 TRADE AND INTERCOURSE ACT.

§ 12. *And be it further enacted*, That no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the constitution. . . .

§ 29. [After listing acts repealed by the 1834 Trade and Intercourse Act, including the 1802 Trade and Intercourse Act] . . . *Provided, however*, That such repeal

shall not effect [affect] any rights acquired, or punishments, penalties, or forfeitures incurred, under either of the acts or parts of acts, nor impair or affect the intercourse act of eighteen hundred and two, so far as the same relates to or concerns Indian tribes residing east of the Mississippi: . . .

Complete texts of these statutory provisions are set forth in the Appendix hereto.

Statement of the Case.

This case concerns the interpretation and application of portions of several acts of Congress regulating trade and intercourse with Indian tribes. The respondent, claiming to be the Mashpee Tribe of Indians, filed an action in which it claimed possession of essentially all of the land in the Town of Mashpee, Massachusetts, and additional lands in the adjoining town of Sandwich ("the subject land"). The jurisdiction of the United States District Court for the District of Massachusetts was invoked under 28 U.S.C. § 1331 (1966). The Mashpee Tribe claimed that it was once in possession of the subject land but that the subject land was alienated away under several statutes passed by the Commonwealth of Massachusetts, most particularly acts passed between 1834 and 1870. The Mashpee Tribe alleged that the land transactions involved violated the then applicable provisions of the several Trade and Intercourse Acts denying validity to any conveyance of lands from any Indian nation or tribe of Indians made other than by treaty or convention. The version of that provision governing land transactions is now codified at 25 U.S.C. § 177 (1963).

In answer to the complaint, petitioners put at issue the existence of the Mashpee Tribe at the time of the wrongs alleged and at the time the suit was begun. That issue was severed for a separate jury trial. At the close of the evidence presented by the Mashpee Tribe, petitioners moved for a directed verdict on several grounds, including the ground that sections of the Trade and Intercourse Acts in effect at the time of the alleged wrongs exempted from the ambit of federal regulation any trade or intercourse with "Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual states . . .." 1802 Trade and Intercourse Act, § 19. Petitioners maintained in that motion that the evidence presented by the Mashpee Tribe proved the elements necessary for the application of this exception to the general regulation of trade and intercourse with Indian tribes. Petitioners raised the same issue at the close of all of the evidence and again after the return of the jury's answers to special interrogatories. On March 24, 1978, the trial court issued a memorandum and orders on various motions which, in relevant part, denied the motions for directed verdict and for entry of judgment based upon the exception, saying:

> I am of the opinion that the so-called white settlement exception does not apply to alienation of tribal land, for the reason stated in *Narrangansett Tribe of Indians v. Southern Rhode Island Land Development Corp.*, 418 F. Supp. 798, 808-809 (D.R.I. 1976), and also for the reason that the underlying policies of the act insofar as it relates to land, i.e., (1) to keep peace with the Indians, and (2) to prevent the Indians from becoming homeless charges, would apply with equal force to tribes surrounded by white settlements as to any other tribes.

> It should be noted for purposes of this motion, that the evidence is undisputed that by the early eighteenth century the communities surrounding Mashpee had been substantially settled by non-Indians and had been incorporated as the towns of Falmouth, Sandwich and Barnstable.
>
> In view of my reading of the statute, however, defendants' motion for a directed verdict is DENIED. *Mashpee Tribe* v. *Town of Mashpee*, 447 F. Supp. 940, 950 (D. Mass. 1978).

The principal holding by the District Court in *Mashpee Tribe* v. *Town of Mashpee, supra*, was the dismissal of the claims of the Mashpee Tribe based upon the jury findings that the Mashpee Tribe did not exist at several critical dates relevant to the claim. That judgment was appealed to the United States Court of Appeals for the First Circuit, which affirmed the judgment below. Petitioners brought a separate appeal from the denial of their motions for directed verdict and for entry of judgment based upon the exception cited above. The First Circuit determined that the issue of the exception need not be decided. *Mashpee Tribe* v. *New Seabury Corp.*, 592 F. 2d 575, 594 (1st Cir. 1979).

Reasons for Granting the Writ.

I. The Exception to the Scope of Federal Regulation of Indian Tribes has Never been Addressed Squarely by this Court.

Until recently, Indian land claims under the Trade and Intercourse Acts east of the Mississippi had been exceedingly

rare. This case presented several issues of law that demanded for their solution the resurrection of long dormant legislative histories and policies. The definition of an "Indian tribe" within the meaning of old federal legislation was one such issue; a second and companion issue was the comprehension of the intent of Congress in enacting stringent federal regulation over trade with Indians. The exception to that stringent federal regulation is a key to comprehending the true scope of the regulation that Congress intended. In the event this Court grants a writ of certiorari in this case to review the judgments and opinions below on the nature of tribal existence under the Trade and Intercourse Acts, this Court ought at the same time to take up the issue of the policy and intent of those acts as embodied in the exception and in the full context of the several Trade and Intercourse Acts.

The relationship between the nature of tribal existence so as to justify federal regulation and the exception urged by petitioners below is close. The Trade and Intercourse Acts forbade transactions in land with Indian tribes absent a treaty or convention. The specification of a treaty comports with the recognition of the Indian tribes as distinct, separate political entities with powers of self-government. *E.g.*, *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 18-19 (1831). To this day, Indian tribes retain their attributes of sovereignty over both their members and their territory. *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978). The demand that transactions in the land of Indian tribes be by a treaty between that tribe and the United States must, petitioners urge, be contrasted with the express disinterest of the United States in any trade or intercourse with Indians situated within the terms of the exception of § 19 of the 1802 Trade and Intercourse Act. Those Indians referenced in that statutory provision not only were surrounded by settlements of the citizens of the United States, but also were under the "ordinary jurisdiction" of the state within

whose boundaries they resided. This distinction between Indians regulated by the United States and Indians subject to the regular laws of a state has a crucial bearing on the scope of federal regulation and on the meaning of the "Indian tribes" to which that regulation applied. The scope of federal regulation embodied in the Trade and Intercourse Acts "cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them." *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978).

The meaning of the exception to the Trade and Intercourse Acts has been treated only fleetingly by this Court. For example, the phrase "ordinary jurisdiction" as used in the exception was treated indirectly in *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832). Between 1828 and 1831, the State of Georgia passed a number of laws that, among other things, made it unlawful for the Cherokee Nation to make laws, operate courts or otherwise exercise a sovereignty independent of the State of Georgia. *Worcester* v. *Georgia*, *supra*, at 521-526 (statement of facts). These acts of Georgia further aimed to add the territory of the Cherokee Nation to several counties of the State of Georgia, and to regulate the rights and duties of members of the Cherokee Nation and other persons within the Cherokee lands. The territory of the Cherokee Nation was within the territorial limits of the State of Georgia. 31 U.S. (6 Pet.) at 583-584 (McLean, J., concurring). Georgia, by passing the laws challenged in that case, sought to bring the Cherokee Nation within the terms of the exception contained in § 19 of the 1802 Trade and Intercourse Act. This construction of the intent of the State of Georgia is confirmed by the comments of President Jackson in his Message from the President of the United States to the Senate, February 23, 1831, *Senate Documents* [65], vol. 2, 21st Cong., 2d Sess. In that Message, Jackson stated his view that the acts of Georgia

brought the Cherokee Nation squarely within the terms of the exception, not only surrounded by settlements of citizens of the United States but also within the ordinary jurisdiction of that state. *See also* Cohen, F., *Federal Indian Law* (3d Printing, Dobbs Ferry, N.Y., Oceana Publications, 1972), at pp. 181-184.

Viewed in this context, the opinions in *Worcester* v. *Georgia*, *supra*, may be read profitably as an extended essay on "ordinary jurisdiction." The Cherokee Nation was not within the "ordinary jurisdiction" of Georgia precisely because treaties between the United States and the Cherokees recognized beyond equivocation the Cherokee right of self-government, free from encumbrance by any state. 31 U.S. (6 Pet.) at 551-556. The Trade and Intercourse Acts "manifest a firm purpose to afford that protection which treaties stipulate." 31 U.S. (6 Pet.) at 556-557. Even if no treaties ever existed, the incidences of Cherokee self-government that the acts of Georgia sought to restrain — legislation, the enforcement of laws through courts and the other exercises of a sovereignty distinct and opposed to the laws of Georgia — are testimony that the Cherokees were not within the "common exercise of the jurisdiction" of Georgia.

The terms of the exception to federal regulation under the Trade and Intercourse Acts were also addressed in dicta by Justice McLean in his concurrence in *Worcester* v. *Georgia*, *supra*, at 580, 589. Justice McLean described the objects of the exception as those Indians

> [i]n some of the old states, Massachusetts, Connecticut, Rhode Island, and others, . . . surrounded by white population, and who, by their reduced numbers, had lost the power of self-government, [where] the laws of the state have been extended over them, for the protection of their persons and properties.
>
> . . . . . .

> To constitute an exception to the provisions of this act, the Indian settlement, at the time of its passage, must have been surrounded by settlements of the citizens of the United States, and within the ordinary jurisdiction of a state; not only within the limits of a state, but *within the common exercise of its jurisdiction*.
>
> . . . . . .
>
> The exception applied, exclusively, to those fragments of tribes which are found in several of the states, and which came literally within the description used. (Emphasis added.)

The distinction between those Indians subject to exclusive federal regulation and those Indians exempted from such regulation by terms of the exception was apparent also to Justice Thompson, joined by Justice Story, in his dissenting opinion in *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 74 (1831). The exception contained in § 19 of the 1802 Trade and Intercourse Act was there described as follows:

> But this section admits of a plain and obvious interpretation, consistent with other parts of the act, and in harmony with these treaties [Treaties of 1791 and 1798 with Cherokees]. The reference undoubtedly is to that class of Indians which has already been referred to, consisting of the mere remnants of tribes, which have become almost extinct; and who have, in a great measure, lost their original character, and abandoned their usages and customs, and become subject to the laws of the state, although in many parts of the country living together, and surrounded by the whites. They cannot be said to have any distinct

government of their own, and are within the ordinary jurisdiction and government of the state where they are located.

This contemporaneous perspective on the scope of federal regulation has passed, it seems, from the immediate consciousness of both bar and bench. Faced with the now novel prospect that the seemingly unbridled reach of the Trade and Intercourse Acts may, at times crucial to the claims at issue, have been limited in scope, courts have resorted to strained exegesis of statutory language as a substitute for analysis of the policies embodied in federal Indian regulation. In *Narragansett Tribe of Indians* v. *Southern R.I. Land Development Corp.*, 418 F. Supp. 798, 808-809 (D. R.I. 1976), the decision relied upon by the trial court below, the Court rested its analysis upon a supposed difference between Trade and Intercourse Act provisions enacted in 1802 and 1834.[2] This focus

[2]The complete text of the decision relating to the exception, absent footnotes, is as follows:

> Finally, plaintiff seeks to strike the defenses which claim that plaintiff falls within an exception to coverage of the Nonintercourse Act. This exception appeared as a proviso in early reenactments of the Act between 1793 and 1802 and provided that:
>
> "nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual states." Act of March 1, 1793, ch. 19, § 13, 1 Stat. 331; Act of May 19, 1796, ch. 30, § 19, 1 Stat. 474; Act of March 30, 1802, ch. 13, § 19, 2 Stat. 145.
>
> At the time that this proviso was a part of the Act, the terms of the Act applied to land of "any Indian" as well as to that of any "nation or tribe of Indians." The proviso was repealed in 1834, Act of June 30, 1834, ch. 161, § 29, 4 Stat. 734, at the same time that transactions by individual Indians were removed completely from the coverage of the Act. *See* note 10, *supra*. Thus the most logical interpretation of the proviso is the one which is also the most consistent with the rules of construction governing statutes relating to Indians, *see* note 9, *supra*: the proviso was addressed to transactions by individual Indians living in "white" settlements and has no application to land to which a *tribal* right of occupancy is claimed. (Emphasis in original.)

upon the supposed significance of the deletion of the phrase "any Indian" from the Trade and Intercourse Act enacted in 1834 assumes that Congress intended previously to regulate *by treaty* the land dealings of individual Indians. The incongruity of this interpretation of the words "any Indian" was made manifest by this Court's recent opinion in *Wilson* v. *Omaha Indian Tribe*, S. Ct. Nos. 78-160, 78-161, slip op. 9, 47 U.S.L.W. 4758, 4760 (June 20, 1979). Faced there with another provision of the Trade and Intercourse Acts that referenced only "an Indian," the Court found that the statute was passed primarily for the benefit of the Indian tribes. Indeed, at the time the early Trade and Intercourse Acts were passed, "virtually all Indian land was tribally held." *Id.* at 4761. The notion that, prior to 1834, an individual Indian living in Boston could not sell his home without resort to a treaty between him and the United States is at least a novel gloss on the treaty making power. Worse, it is symptomatic of the absence of perspective wrought by the passage of years since authoritative constructions of Indian statutes and their underlying policies.

For all these reasons, the decisions below ought not to be reviewed by this Court without a full development of the relevant statutes, legislative history and underlying policies of federal Indian legislation. The Trade and Intercourse Act provisions governing transactions in Indian lands should not be construed in isolation. Indeed, a full review of the law applicable to this claim ought to lead to reversal of the denial of

petitioners' motions for directed verdict and entry of judgment in this case.

II. The Exception to the Trade and Intercourse Acts and the Policies Underlying Federal Indian Regulation Will be at Issue in Other Cases.

The arrival of Indian land claims in the eastern United States is a matter of public record. Those Indian claims based upon treaty provisions or on behalf of Indian tribes long recognized by the federal government will rise or fall upon the terms of treaties or upon bodies of law that are relatively well developed. Claims by groups such as the Mashpee Tribe, however, are a new and uncharted phenomenon. Several cases in New England raise similar claims that may be guided by an authoritative exposition of the true scope of federal Indian regulation. *See, e.g., Wampanoag Tribe of Gay Head* v. *Town of Gay Head*, Civil Action No. 74-5826-G (D. Mass., filed December 26, 1974); *Western Pequot Tribe* v. *Holdridge Enterprises, Inc.*, Civil Action No. H-76-193 (D. Conn., filed 1976); *Schaghticoke Tribe of Indians* v. *Kent School Corp.*, 423 F. Supp. 780 (D. Conn. 1976) (opinion on preliminary motions). Each of these controversies is brought by Indian groups which may well be subject to the terms of the exception. Those cases, like this one, ought not be decided upon principles of federal regulation of Indians applicable fully to treaty or long recognized tribes but inapplicable to those Indians that Congress excepted from regulation. Other cases in which the exception or related matters of statutory interpretation are at issue exist within still other jurisdictions.[3]

[3] A partial list of cases includes: *United States* v. *Maine*, Civ. No. 1966-ND, 1969-ND (D. Me.); *Chitimacha Tribe* v. *Harry L. Laws Co.*, Civ. No. 77-772-L. (W.D. La.); *Oneida Indian Nation* v. *County of Oneida*, 70-CV-35 (N.D. N.Y.); *Oneida Indian Nation* v. *New York State Thruway Authority*, 78-CV-104 (N.D. N.Y.); *Seminole Tribe* v. *Florida*, No. 78-6116-CIV (S.D. Fla.). In addition to these and numerous other pending cases, the United States, through the Department of the Interior, has indicated its intention to recommend the institution of a number of additional actions on behalf of Indian tribes. For example, on July 1, 1977, the Department announced its recommendation that the Justice Department on behalf of St. Regis, Mohawk, Cayuga and Oneida Nation Tribes sue those persons claiming an adverse interest in approximately 272,500 acres of land in upper New York State. Department of Interior News Release dated July 1, 1977. On August 30, 1977, the Department similarly recommended litigation on behalf of the Catawba Indian Tribe for approximately 140,000 acres of land in the Rock Hill, South Carolina, area. Washington Post, August 31, 1977, at p. A6. In fact, in connection with legislation to extend the statute of limitations provided in 28 U.S.C. § 2415 for commencing Indian claims for monetary damages by the United States, as trustee, the Department indicated that the number of potential claims under review "could amount to well over 1,000." S. Rep. No. 95-236, 95th Cong., 1st Sess. 2 (1977).

Conclusion.

For all these reasons, petitioners pray that, in the event this Court grants a writ of certiorari to review the decision below upon the petition of the Mashpee Tribe, a writ of certiorari also issue to review the denial of petitioner's motions directed to the exception set forth within the Trade and Intercourse Acts.

Respectfully submitted,

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Appendix.

UNITED STATES CODE, TITLE 25 (1963).

§ 177. Purchases or grants of lands from Indians.

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty. [R.S. § 2116.]

Act of 1802, ch. 13, 2 Stat. 139.

SECTION 12. *And be it further enacted*, That no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian, or nation, or tribe of Indians, within the bounds of the United States, shall be of any validity, in law or equity, unless the same be made by treaty or convention, entered into pursuant to the constitution: and it shall be a misdemeanor in any person, not employed under the authority of the United States, to negotiate such treaty or convention directly or indirectly, to treat with any such Indian nation, or tribe of Indians, for the title or purchase of any lands by them held or claimed, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months: *Provided, nevertheless*, that it shall be lawful for the agent or agents of any state, who may be present at any treaty held with Indians, under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made, for their claims to lands within such state, which shall be extinguished by the treaty.

SECTION 19. *And be it further enacted*, That nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual states; or the unmolested use of a road from Washington district to Mero district, or to prevent the citizens of Tennessee from keeping in repair the said road, under the direction or orders of the governor of said state, and of the navigation of the Tennessee river, as reserved and secured by treaty; nor shall this act be contrued to prevent any

person or persons travelling from Knoxville to Price's settlement, or to the settlement on Obed's river (so called), provided they shall travel in the trace or path which is usually travelled, and provided the Indians make no objection; but if the Indians object, the President of the United States is hereby authorized to issue a proclamation, prohibiting all travelling on said traces, or either of them, as the case may be, after which, the penalties of this act shall be incurred by every person travelling or being found on said traces, or either of them, to which the prohibition may apply, within the Indian boundary, without a passport.

Act of 1834, ch. 161, 4 Stat. 729.

SECTION 12. *And be it further enacted*, That no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the constitution. And if any person, not employed under the authority of the United States shall attempt to negotiate such treaty or convention, directly or indirectly, to treat with any such nation or tribe of Indians, for the title or purchase of any lands by them held or claimed, such person shall forfeit and pay one thousand dollars: *Provided, nevertheless*, That it shall be lawful for the agent or agents of any state who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner or commissioners of the United States appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made for their claim to lands within such state, which shall be extinguished by treaty.

SECTION 29. *And be it further enacted*, That the following acts and parts of acts shall be, and the same are hereby repealed, namely: An act to make provision relative to rations for Indians, and to their visits to the seat of government, approved May thirteenth, eighteen hundred; an act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers, approved March thirty, eighteen hundred and two; an act supplementary to the act passed thirtieth March, eighteen hundred and two, to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers, approved April twenty-nine, eighteen hundred and sixteen; an act for the punishment of crimes and offences committed within the Indian boundaries, approved March three, eighteen hundred and seventeen; the first and second sections of the act directing the manner of appointing Indian agents, and continuing the "Act establishing trading-houses with the Indian tribes," approved April sixteen, eighteen hundred and eighteen; an act fixing the compensation of Indian agents and factors, approved April twenty, eighteen hundred and eighteen; an act supplementary to the act entitled "An act to provide for the prompt settlement of public accounts," approved February twenty-four, eighteen hundred and nineteen; the eighth section of the act making appropriations to carry into effect treaties concluded with several Indian tribes therein mentioned, approved March three, eighteen hundred and nineteen; the second section of the act to continue in force for a further time the act entitled "An act for establishing trading-houses with the Indian tribes, and for other purposes," (*a*) approved March three, eighteen hundred and nineteen; an act to amend an act entitled "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers," approved thirtieth of March, eighteen hundred and two, approved May six, eighteen hundred and twenty-two; an

act providing for the appointment of an agent for the Osage Indians west of the state of Missouri and territory of Arkansas, and for other purposes, approved May eighteen, eighteen hundred and twenty-four; the third, fourth, and fifth sections of "An act to enable the President to hold treaties with certain Indian tribes, and for other purposes," approved May twenty-five, eighteen hundred and twenty-four; the second section of the "Act to aid certain Indians of the Creek nation in their removal to the west of the Mississippi," approved May twenty, eighteen hundred and twenty-six; and an act to authorize the appointment of a subagent to the Winnebago Indians on Rock river, approved February twenty-five, eighteen hundred and thirty-one: *Provided, however*, That such repeal shall not effect [affect] any rights acquired, or punishments, penalties, or forfeitures incurred, under either of the acts or parts of acts, nor impair or affect the intercourse act of eighteen hundred and two, so far as the same relates to or concerns Indian tribes residing east of the Mississippi: *And provided also*, That such repeal shall not be construed to revive any acts or parts of acts repealed by either of the acts or sections herein described.

United States Court of Appeals
For the First Circuit

No. 78-1272.

MASHPEE TRIBE,
PLAINTIFF, APPELLANT.
v.
NEW SEABURY CORP., ET AL.,
DEFENDANTS, APPELLEES.

No. 78-1273.

MASHPEE TRIBE,
PLAINTIFF, APPELLEE,
v.
NEW SEABURY CORP., ET AL.,
DEFENDANTS, APPELLANTS.

No. 78-1274.

MASHPEE TRIBE,
PLAINTIFF, APPELLEE.
v.
NEW SEABURY CORP., ET AL.,
DEFENDANTS, APPELLEES.

MATTHEW B. CONNOLLY, ETC.,
DEFENDANT, APPELLANT.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. WALTER JAY SKINNER, *U.S. District Judge*]

Before COFFIN, *Chief Judge*.
CAMPBELL and BOWNES, *Circuit Judges*.

James D. St. Clair and *Allan van Gestel*, with whom *Stephen H. Oleskey*, *William F. Lee*, *Hale and Dorr*, *James J. Dillon*, *Goodwin, Procter & Hoar*, *Morris Kirsner*, *Edwin J. Carr*, *May, Bilodeau, Dondis & Landergan*, *Thomas B. Shea*, *Andrew J. McElaney*, Assistant Attorney General, *Thomas Otis*, *Selma R. Rollins*, and *Rollins, Rollins & Fox*, were on brief, for New Seabury Corp. et al.

Richard B. Collins, with whom *Thomas N. Tureen*, *Moshe J. Genauer*, and *Barry A. Margolin*, were on brief, for Mashpee tribe.

Joseph E. Brennan, Attorney General, *John M. R. Paterson*, Deputy Attorney General, and *David Rosenman*, Assistant Attorney General on brief for the State of Maine, amicus curiae.

February 13, 1979

COFFIN, *Chief Judge*. Plaintiff, denominating itself the Mashpee Tribe, claims to be a tribe of Indians that has lived in and around the town of Mashpee, Massachusetts, continuously since time immemorial. The suit is based on the Indian Nonintercourse Act which was first passed in 1790 and exists now as 25 U.S.C. § 177:

> "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. . . ."

Plaintiff claims that its tribal land was taken from it between 1834 and 1870 without the required federal consent. This suit, filed August 26, 1976, against a defendant class representing landowners in the town of Mashpee, seeks recovery of those lands.

Defendants answered the complaint, in part, by denying that plaintiff is or was a tribe. It is undisputed that if plaintiff was not a tribe in 1976 it lacked standing to bring this suit and that if not a tribe at the critical times in the nineteenth century it was not protected by the Act. The district court severed the issue of plaintiff's tribal status for a separate, preliminary trial. Before trial plaintiff moved for a continuance pending the Department of the Interior's

determination whether or not to declare plaintiff a federally recognized tribe. The court denied the motion, and trial began October 17, 1977. The trial lasted 40 days and was submitted to the jury on special interrogatories January 4, 1978. The jury returned its verdict on January 6. The interrogatories, together with the jury's answers, were as follows:

"1. Did the proprietors of Mashpee, together with their spouses and children, constitute an Indian tribe on any of the following dates:

a. July 22, 1790: The date of the enactment of the first version of the federal Nonintercourse Act.

No

b. March 31, 1834: The date on which the District of Marshpee was established. [sic]

Yes

c. March 3, 1842: The date on which formal partition of land in the District of Marshpee among the proprietors of Marshpee and their children was authorized by act of the legislature of the Commonwealth of Massachusetts?

Yes

d. June 23, 1869: The date on which all restraints on alienation of land held individually by Indians and people of color known as Indians were removed by act of the legislature of the Commonwealth of Massachusetts?

No

e. May 28, 1870: The date on which the Town of Mashpee was incorporated by act of legislature of the Commonwealth of Massachusetts: [sic]

No

2. Did the plaintiff group, as identified by the plaintiff's witnesses, constitute an Indian tribe as of

August 26, 1976: The date of the commencement of this law suit?

No

3. If you find that people living in Mashpee constituted an Indian tribe or nation on any of the dates prior to August 26, 1976 listed in Special Question No. 1, did they continuously exist as such a tribe or nation from such date or dates up to and including August 26, 1976?

No"

Mashpee Tribe v. *Town of Mashpee*, 447 F. Supp. 940, 943 (D. Mass. 1978).

After receiving these answers, but without discharging the jury, the court requested memoranda from the parties to show cause why an order of dismissal should not be entered on the basis of the jury's answers. Plaintiff argued that the special verdicts were inconsistent and ambiguous and moved that, therefore, a new trial should be ordered. The court denied the motion and dismissed the case. Plaintiff asserts in appeal No. 78-1272 as error the court's denial of the pre-trial motion for a continuance, certain aspects of the court's instruction on the definition of "tribe", the court's instructions concerning allocation of the burden of proof, the court's ruling that the special verdicts were not fatally inconsistent or ambiguous, and the court's handling of an ex parte communication with a juror. These issues will be taken up in turn, and we will present the necessary factual background as needed. A fuller discussion of the relevant history may be found in *Mashpee Tribe, supra*, 447 F. Supp. at 943-47. We will not attempt to duplicate the district court's effort.

I.

Plaintiff argues that the district court erred by refusing to grant a continuance pending Department of the Interior action on Mashpee's application for federal recognition as

a tribe. Plaintiff moved for a continuance upon learning that the Department, in a departure from previous policy, had issued proposed regulations for determining whether to recognize tribes and that, using these regulations, the Department would begin proceedings concerning the Mashpees. The court denied the motion but invited the Department to participate in the trial either as an intervenor or as an amicus curiae with permission to submit questions for the court to ask witnesses. The Department chose not to participate in either capacity in part because the Department had not yet taken "a defintive position on the regulations" and, thus, would "not be able to participate meaningfully in the trial of this case at this time."

We hold that the court acted correctly in denying the continuance. The cases cited by plaintiff demonstrate that this is not the kind of case in which the Supreme Court has required courts to defer to administrative process. The deference doctrine[1] primarily serves as a means of coordinating administrative and judicial machinery. *Port of Boston Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 68 (1970); *United States* v. *Western Pacific R.R. Co.*, 352 U.S. 59, 62 (1956); *Far East Conference* v. *United States*, 342 U.S. 570, 575 (1952); *Locust Cartage Co., Inc.* v. *Transamerican Freight Lines, Inc.*, 430 F.2d 334, 339 (1st Cir. 1970). It is meant to promote uniformity and take advantage of agencies' special expertise. *Western Pacific R.R. Co., supra*, 352 U.S. at 64; *Far East Conference, supra*, 342 U.S. at 574-75. In a recent pair of antitrust cases against a commodities exchange

[1] The doctrine has occasionally been referred to under the label "primary jurisdiction", *see, e.g., Port of Boston Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 68 (1970), but the Court has not used the label in all its administrative deference cases. The problem, strictly speaking, is not one of jurisdiction. Indeed it comes into play only when both the court and the agency have jurisdiction over at least portions of the dispute. Rather the problem is one of harmony, efficiency, and prudence.

regulated by the Commodities Exchange Commission, the Court looked at three factors to determine whether a court should defer: (1) whether the agency determination lay at the heart of the task assigned the agency by Congress; (2) whether agency expertise was required to unravel intricate, technical facts; and (3) whether, though perhaps not determinative, the agency determination would materially aid the court. *Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113, 114-15 (1973); *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973). Other cases have identified other reasons for deferring to administrative agencies. Deference can dam a potential flood of suits seeking de novo review of agency determinations. *Weinberger* v. *Bentex Pharmaceuticals, Inc.*, 412 U.S. 645, 653 (1973) (fearing suits testing the status of each newly developed "me-too" drug). Deference can permit an agency to follow through and supervise earlier actions. *Port of Boston, supra*, 400 U.S. at 68 (agency had approved the agreement under dispute). The doctrine recognizes that some problems are better solved by the more flexible procedures possible before agencies not bound by Article III limitations. *Id.* And, finally, agencies often have prescribed procedures specially designed to resolve particular kinds of disputes. *Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334, 339 (1963); *Western Pacific R.R. Co., supra*, 352 U.S. at 64.[2]

The Department of the Interior has not historically spent much effort deciding whether particular groups of people are Indian tribes. By and large no one has disputed the tribal status of Indians with whom the Department has

[2] Though the Court has suggested that "[i]t is a doctrine allocating the law-making power over certain aspects of commercial relations", *United States* v. *Western Pacific R.R. Co.*, 352 U.S. 59, 65 (1956), it has been applied somewhat more broadly. *See Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334 (1963) (management of public lands). Nor is a plaintiff barred from invoking the doctrine. *Id.*

dealt. The Department has never formally passed on the tribal status of the Mashpees or, so far as the record shows, any other group whose status was disputed. Therefore, the Department does not yet have prescribed procedures and has not been called on to develop special expertise in distinguishing tribes from other groups of Indians. Moreover, the facts in this case, though developed and interpreted in part with the expert help of historians and anthropologists, are not so technical as to be beyond the understanding of judges or juries. As the court said in its charge, "We are dealing with the human condition here as well." Finally, ours is a straightforward Article III case. The resolution will not affect rights of others than the parties except in the traditional legal effect that our opinion will have as precedent. The facts on which the dispute turns, though hard to come by, are adjudicative facts. They are not in the nature of legislative policy decisions. For all these reasons, we cannot be sure how helpful the Department's ultimate decision might be. We can, however, be certain that the decision will not be available soon. The court was right to respect the "strong public interest in the prompt resolution" of the case and not defer to administrative action of uncertain aid and uncertain speed. It follows from what we have said, of course, that in another case, once the Department has finally approved its regulations and developed special expertise through applying them, we might arrive at a different answer.

II.

The next challenge is to the court's instructions on the definition of "tribe". Plaintiff must prove that it meets the definition of "tribe of Indians" as that phrase is used in the Nonintercourse Act both in order to establish any right to recovery and to establish standing to bring this suit. This issue is particularly difficult in this case because the Mashpees differ from most other groups who have

sought to assert rights as Indian tribes. The federal government has never officially recognized the Mashpees as a tribe or actively supported or watched over them. Moreover, the Mashpees have a long history of intermarriage with non-Indians and acceptance of non-Indian religion and culture. These facts do not necessarily mean that the Mashpees are not a tribe protected by federal law,[3] but they do make the issue of tribal existence a difficult factual question for the jury.

Because most groups of Indians involved in litigation in the federal courts have been federally recognized Indians on western reservations, the courts have been able to accept tribal status as a given on the basis of the doctrine going back at least to *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 756-57 (1867), that the courts will accord substantial weight to federal recognition of a tribe. *See, e.g., Joint Tribal Council of the Passamaquoddy Tribe* v. *Morton*, 528 F.2d 370, 377 (1st Cir. 1975). One consequence is that very little case law has developed on the meaning of "tribe". The court below, in its instructions to the jury, relied primarily on *Montoya* v. *United States*, 180 U.S. 261, 266 (1901):

> "By a 'tribe' we understand a body of Indians of the same or similar race, united in a community under one

[3] As we said in *Joint Tribal Council of the Passamaquoddy Tribe* v. *Morton*, 528 F.2d 370, 371 (1st Cir. 1975), "Congress is not prevented from legislating as to tribes generally; and this appears to be what it has done in successive versions of the Nonintercourse Act. There is nothing in the Act to suggest that 'tribe' is to be read to exclude a bona fide tribe not otherwise federally recognized." On the other hand, though the scope of congressional power to deal with the Indians is very broad, it is not unlimited. Congress cannot deal with Indians solely as a racial group. *United States* v. *Antelope*, 430 U.S. 641, 645 (1977). Nor can Congress arbitrarily label a group of people a tribe. *United States* v. *Candelaria*, 271 U.S. 432, 439 (1926); *United States* v. *Sandoval*, 231 U.S. 28, 46 (1913). A tribe must be something more than a private, voluntary organization. *United States* v. *Mazurie*, 419 U.S. 544, 557 (1975).

leadership or government, and inhabiting a particular though sometimes ill-defined territory . . ."[4]

Neither party challenges this basic definition, but it is far from satisfactory. Its four elements—(a) "same or similar race"; (b) "united in a community"; (c) "under one leadership or government"; and (d) "inhabiting a particular . . . territory"—leave much to be explained. A few other cases have described characteristics of tribes whose status as such was in question. *See United States* v. *Candelaria*, 271 U.S. 432, 442-43 (1926); *The Kansas Indians*, 72 U.S. (5 Wal.) 737, 756 (1867); *United States* v. *Wright*, 53 F.2d 301 (4th Cir. 1931). But these tribes bore little resemblance to the Mashpees.

Starting with the *Montoya* definition, the district court went on to explain each of its elements at some length. Plaintiff asserts as error the court's explanation of two of the elements of the definition: (1) the requirement of a "leadership or government" and (2) the requirement that the Indians be "united in a community".

Beginning with the requirement of leadership, we will reprint the several pertinent sections of the charge rather than attempt to summarize the court's explanation.

"There has to be a leadership or government. . . . Obviously, this was a little enclave in one corner of Massa-

[4] Though *Montoya* did not involve the Nonintercourse Act, this definition was later used in *United States* v. *Candelaria*, 271 U.S. 432, 443 (1926), which did involve the Nonintercourse Act. The scope of the phrase "Indian tribe" may vary from statute to statute, *see United States* v. *Sandoval*, 231 U.S. 28, 48-49 (1913), but it is important to bear in mind that generally legislation conferring benefits or protection on Indians is to be construed liberally in their favor. *Joint Tribal Council of the Passamaquoddy Tribe* v. *Morton*, 388 F. Supp. 649, 660 (D. Me. 1975), *aff'd*, 528 F.2d 370 (1st Cir. 1975), and cases cited. The policies of the Act in question may be used to aid in interpreting the Act, *Joint Tribal Council*, *supra*, 528 F.2d at 377, but if Congress chooses to give Indian tribes a far-reaching remedy that choice should not be frustrated by judicial decree.

chusetts. It could not have a government like that in Massachusetts; it could not compete with the government of Massachusetts. Clearly, there was an area in which it could exercise control over its own internal relations, to control the relationship . . . among its own members . . . , between the management and the others and among all of the members of the group."

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"The level of leadership or government that was appropriate for this situation also has to be considered in terms of the need. How much government do you need? You've got three or four hundred people on 13,000 acres of land, and their interaction may not have been so intense as to require constant regulation. Bear in mind these . . . three and four hundred people . . . were grouped in families, in family households, and it may well be they were spread kind of thin. How much government is required? Well, that is for you to decide."

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"There were a series of petitions in the 1740's - 1760's, leading to the formation of the district. After 1788 some more petitions complaining about the grieved position under the guardians. It may be a reasonable inference from those events that there was a continuing political leadership, but you must be prepared to make that inference, and that is solely for you to determine because sporadic grouping, sporadic leadership is not what is meant by 'united in a community under one leadership or government.'

You can have that any time in a fire or flood in the neighborhood where some people will emerge and organize a rescue or organize boats or a bucket brigade, whatever is needed. That is not the kind of leadership we are talking about. We are talking about

something that goes on, has continuity. Continuity of leadership in which leadership is passed on in some orderly way."

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"[T]he notion of sovereignty . . . is not an element, a necessary element of tribal existence. What it is is a leadership which has evolved in some respect . . . which has its roots and has evolved from a once sovereign Indian community. Now, it may take different forms."

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"Clearly, whatever kind of leadership or government the tribe has, if it is a tribe, it cannot compete with the duly established government of the Commonwealth. You would not expect, under these circumstances, and it would not be legally permissible for a group within a town to have its own courts, in any formal sense. It could conceivably set up a school system if it were sufficiently wealthy, . . . but that . . . should be considered in the context of a school system, which until recently, was predominantly Indian, anyway, according to the testimony."

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"The testimony most favorable to the palintiff has been that these leaders, as identified by various witnesses, are leaders with respect to a way of life. . . . [Y]ou can consider all of that testimony, whether there is enough in your opinion to warrant the inference that there was controlling leadership of significant elements in the lives of the people. Significant elements. For the leadership to be such as qualifies the group as a tribe, there must be followers."

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"There was a core group that was very much concerned about Indian affairs, a good many of them have shown up in the courtroom, some have not.

Now, the existence of 30, 40, 50, 60 people, who are concerned with the existence of a chief, who pay attention to what the chief is doing, expect various things from the chief of the tribe or the leaders of the tribe, or the leaders of the group, rather, is not enough. You've got to find that the leadership, whatever it is, has a significant effect upon at least a majority of the claimed group."

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"There will be a diminution of influence from the center of the organization to the fringe . . . [T]here are some people who are reasonably enthusiastic and attend all the time, and out at the fringe there are some people that don't show up but once a year and not every year at that. That is a common characteristic of all organizations. We are dealing with the human condition here, as well. I suppose, if you found that to be the situation, it would not mean that there was no tribe. But you do have to find that it is something more than just a small coterie, a small band of enthusiasts who are supporting the Indian leadership, if that is what it is, in Mashpee.

. . . Obviously, more enthusiasm should be e[xp]ected of those within the town than those that are without. . . . Well, . . . it's up to you to decide whether you've got a leadership that is governing the conduct, the lives of the people in some significant way, that people order their lives in response to these leaders' requirements in some significant way. . . ."

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"This is nothing more essentially political than speaking on a town meeting floor or lobbying the Governor of the state, no matter for what purpose. . . . [B]ut the question is, is it significant? Is it evidence of a continuing leadership? That goes back to what I said

about the petitions that were filed in the eighteenth century."

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"Now, that is for you to decide, under all the circumstances, whether that leadership is tribal leadership, whether it's the leadership which would be followed, adopted and obeyed in some significant degree by at least a majority of the people who are going to be a tribe in 1976."

Plaintiff complains that the court erroneously required it to prove "binding authority" over the group's members and an orderly means of transmitting the leadership. The first complaint is not true as a matter of fact. The court never said that a tribe's leaders' influence must be "binding" but that they must cause the people to "order their lives . . . in some significant way". The people must "follow[ ], adopt[ ] and obey[ ]" the leadership. And the leadership must be "controlling . . . of significant elements in the lives of the people." But the court's discussion demonstrates that it did not require plaintiffs to show "coercive power or binding authority" or to "exhibit the full panoply of governmental powers exercised by advanced groups . . . ." The court was trying to establish a fair test to determine whether the alleged tribal leadership had any followers. If no one follows, then the would-be leader is not leading anyone and cannot sustain the claim to leadership.

The court explicitly charged that plaintiff did not have to show any kind of sovereignty or an ability to compete with the Commonwealth of Massachusetts for power over the Mashpees. The court pointed out that plaintiff need not have a court system, a school system, or any other formal governmental institutions. Further, the court instructed the jury to consider the claims that the asserted leaders "are leaders with respect to a way of life". Such leadership is certainly not expected to be coercive or binding. Plaintiff was allowed to show leadership, at least in part, by demonstrating that the alleged leaders were role-models to whom a majority of the asserted tribe responded on questions of tribal or ethnic significance. In the same vein the court, in its discussion of diminution of influence towards the fringe of an organization, permitted the jury to consider as followers those who responded to the leaders with less than total enthusiasm. Absolute obedience, voluntary or coerced, was explicitly not a prerequisite to tribal existence. Furthermore, the examples of political activity that the court allowed the jury to consider in deciding whether the requisite leadership or government existed were not examples of coercive power over constituents, but of representation of constituents' interests before non-Indian governmental bodies. One need have no coercive power to speak at town meetings, submit petitions, or lobby a governor. The court required plaintiff to show only such leadership or government as its situation required. The court pointed to some legitimate evidence. Plaintiff's problem was that it did not submit sufficient evidence to convince the jury that the asserted leaders had enough followers on significant issues.

Turning to the issue of continuity of leadership, it is true that the court at one point required that leadership be "passed on in some orderly way". Read in the context of the entire instruction, however, it is clear that the court was not imposing a requirement of formal systems of succession. The court never required elections, inheritance, or any other fixed system of determining a leader's successor. The court's concern was not with how the leadership passed, but with making sure that the leadership did pass. The sentence on which plaintiffs seize was a way of differentiating the necessary leadership from sporadic, crisis-oriented leadership that would disappear as soon as the

crisis was resolved. We agree that a fire or a flood cannot spawn a "tribe" that exists only during the disaster.

Accordingly, the court instructed that there must be a continuous leadership. It suggested as evidence worth considering, the series of petitions filed on behalf of the Mashpees beginning in the middle of the eighteenth century. The court permitted the inference that those petitions might be evidence of a continuing political leadership. We interpret the court's instruction to require that there be a recognized leadership to which the people can turn at any time —a leadership "orderly" in the sense that, whether or not there is a specific short-term crisis, the need for ongoing leadership is always met without a significant break in continuity. Nothing the court said contradicted plaintiff's position that a tribe ought to be able to choose its leaders in any way it sees fit and for whatever purposes are necessary. *Montoya* held that a group without leaders or government could not be a tribe. The district court's instructions are consistent with and, probably, more favorable to plaintiff than the every day usage of the terms in the *Montoya* definition would be. Without the court's interpretation the jurors might well have construed the phrase "leadership or government" to imply the formal kinds of structures and institutions by which the jurors themselves are governed.

Not only did the portions of the court's instructions complained of not mean what plaintiff suggests, but the court read to the jury the very language that plaintiff argues is a more correct statement of law. That passage, also from *Montoya,* explained why, according to the Supreme Court, Indian tribes were not nations.

> "As they had no established laws, no recognized method of choosing their sovereigns by inheritance or election, no officers with defined powers, their governments in their original state were nothing more than a

> temporary submission to an intellectual or physical superior, who in some cases ruled with absolute authority, and in others, was recognized only so long as he was able to dominate the tribe by the qualities which originally enabled him to secure their leadership. In short, the word 'nation' as applied to the uncivilized Indians is so much of a misnomer as to be little more than a compliment." 180 U.S. at 265.

Though not "nations" in the eyes of turn-of-the-century civilization, the groups so described were tribes. The discussion in *Montoya* of "nation" supplements that Court's definition of "tribe". Different sections of an opinion should be read as consistent with each other. Moreover, the district court's definition of "tribe" is consistent with the passage cited above. Therefore, plaintiff's challenge to this aspect of the instruction must fail.

Plaintiff interprets the court's instruction relative to the "united in a community" requirement to permit the jury to find there is no tribe if the Indians have become assimilated into the general society. Its concern is that the jury could find that the tribe ceased to exist through assimilation without having voluntarily decided to abandon tribal existence. Such a finding, it asserts, would be contrary to established law. Again, we will reprint the relevant portions of the court's instruction before discussing plaintiff's position.

> "There has to be a community. 'United in a community,' the Court said. I suggest to you an Indian community is something different from a community of Indians. That is to say, it has some boundary that separates it from the surrounding society, which is perceived as Indian and not merely as neighborhood or territory."[8]

[8] The word "boundary" was used during the trial as an anthropological concept. A boundary in this sense is not something tan-

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"It would be permissible to find that the boundary was in part established by the outside, that is, that there was a social boundary established in part by discrimination of the white inhabitants against the Indians."

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"Now the question for you to decide is whether in accepting this property [the proprietorship], accepting these rights with their limitations, the Indians intended to give up their tribal organization and assume an English organization, or whether it was simply the tribal organization carrying on as owners of this plantation with a different label."

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"The question comes when English forms are adopted. English labels are adopted, whether that has constituted an abandonment of the tribal form in a complete submission and adoption of an English form instead. Abandonment being the key word. Abandonment of a right or status does not occur unless it is voluntary, unless it is a knowing and willing and voluntary act. Abandonment cannot be found because of conditions which have been imposed from the outside."

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"Again [looking at 1976], we have the question of community and whether that community is defined by characteristics which are identifiable as Indian, not necessarily aboriginal Indian."

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"It is, I suppose, possible that by reason of circumstances, tribal existence be so suppressed that it be

gible or territorial like a fence or a border. Rather, it is an attitude or consciousness of difference from others, a sense of distinction between "we" and "they".

in limbo for a period, that it not be manifest for a period without there being an abandonment. If you find that there was, by reason of the activities in 1869, 1870, a conscious abandonment of tribal status, then you would not be warranted in finding the existence of a tribe in 1976."

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"Now, there is one other aspect that I would like to address, and that is the subject of assimilation. In one of the cases it is said that the Nonintercourse Act, really, refers to poor and uninformed people as opposed to assimilated and sophisticated. . . . And by saying a group is assimilated is the reverse of the coin of saying they have a distinct Indian community, and so I suggest that you not be concerned about that except in that context.

If you find that the group is assimilated, well, it doesn't have a distinct community, it's just blended in with everybody else, in all respects or in all significant respects. So assimilation is simply a way of expressing the reverse of the existence of an Indian community."

We agree that if a group of Indians has a set of legal rights by virtue of its status as a tribe, then it ought not to lose those rights absent a voluntary decision made by the tribe and by its guardian, Congress, on its behalf.[8]

[8] In *Passamaquoddy, supra*, we held that the Nonintercourse Act established a trust relationship between Congress and the Indian tribes, 528 F.2d at 379, and that "Congress alone has the right to determine when its guardianship shall cease. . . . Neither the . . . Tribe nor the State . . ., separately or together, would have the right to make that decision and so terminate the federal government's responsibilities." *Id.* at 380 (citations and footnote omitted). The establishment of a trust relationship with tribes generally, however, did not guarantee the perpetual existence of any particular tribe. Plaintiff here must still prove that it was a tribe at the relevant times before it can claim the benefit of a trust relationship.

The Kansas Indians, 72 U.S. (5 Wall.) 737, 757 (1867); *The Confederated Salish and Kootenai Tribes* v. *Moe*, 392 F. Supp. 1297, 1315 (D. Mont. 1975) (supplemental order of three-judge court), *aff'd sub nom. Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976). A tribe, even if it is federally recognized, however, can choose to terminate tribal existence. *See The Kansas Indians, supra*, 72 U.S. at 759 (a state's policy of treating Indians the same as other citizens could "eventually succeed in disbanding the tribe," but presumably only to the extent the tribe chose to acquiesce in that policy); *United States* v. *Joseph*, 94 U.S. 614, 617 (1876), *overruled as to result but not necessarily logic, United States* v. *Sandoval*, 231 U.S. 28, 48 (1913). Certainly individual Indians or portions of tribes may choose to give up tribal status. *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73 (1977) (holding that that portion of tribe which chose to stay behind when tribe moved dissolved relations with tribe and lost interest in tribal claims); *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 171 (1973); *United States* v. *Wright*, 53 F.2d 301 (4th Cir. 1931) (holding that portion of tribe that chose to stay behind when tribe moved lost tribal status though gradually restored to that status by federal recognition and protection). If all or nearly all members of a tribe chose to abandon the tribe, then, it follows, the tribe would disappear.

The court instructed the jury that any abandonment of tribal status must be "knowing and willing and voluntary".[7] Once the jury found that a tribe existed in 1834 and 1842, that tribe could not cease to exist absent a voluntary

[7] This standard for abandonment is sufficiently favorable to the plaintiff. Choosing not to continue as a tribe raises issues very different from those raised when one claimant to property asserts that another abandoned the property. We can think of no reason to import the property law rules concerning abandonment into our context simply because the same word has been used.

decision.[8] The instructions barred the jury from deciding that the tribe went out of existence through some involuntary process of assimilation. The court instructed that involuntary imposition of conditions could not constitute an abandonment. The Indians had to "intend[ ] to give up their tribal organization" and abandon their tribal rights and status voluntarily. The jury obviously found that the tribe had made such a decision. It was open to the jury to decide whether the tribe had decided to give up being a distinct community and instead to merge with the rest of society in all significant respects. We cannot know whether the jury based its verdict on a finding of voluntary assimilation, but such a decision would not go contrary to law.

We conclude that though a few isolated sentences of the charge may have been unclear or overstated, the instructions taken as a whole were largely consistent with the position plaintiff argued before us. Therefore, we will not reverse on the basis of the court's instructions. This holding is a narrow one, and it may be useful to point out what we do not hold. We have no occasion to pass on portions of the court's instruction other than those discussed above. Even as to those portions we have considered, the issue we have decided, technically, is not whether those portions are correct as a matter of law, but whether they conform to the objecting party's view of the law. Finding they do, we see no remaining controversy. Because there are no sure yardsticks against which to measure the court's

[8] We reject defendants' argument that the court did not indicate that tribal existence could terminate through social or cultural assimilation. The court instructed that if the group were sufficiently assimilated then it could not be a tribe. Since the plaintiff was required to prove its tribal status at each relevant date, if the jury found the group was a tribe at one date, but later had voluntarily become assimilated—had ceased to exist as a separate and distinct community—then the jury would have to find they were no longer a tribe.

instructions, we cannot say that even those we considered are correct or the best possible, but we have not found any law conflicting with the portions of the charge we have reviewed.

The court did a good job with a very difficult task. Its explanation related the elements of the broad legal definition, developed when Indian tribes' relationship to the United States was very different, to the particular history of this group and to the modern position of Indians in our society. We think it appropriate that the definition of "tribe" remain broad enough and flexible enough to continue to reflect the inevitable changes in the meaning and importance of tribal relations for the tribal members and the wide variations among tribal groups living in different parts of the country under different conditions. That the Mashpees have lost this case represents not a failure of the law to protect Indians in changing times, but a failure of the evidence to show that this group was an object of the protective laws. In future cases, if the issue of tribal status is raised, the court, with the aid of the parties and expert witnesses, will be able to shape instructions responsive to the special problems presented at that time. For these reasons, we think it preferable not to adopt, word-for-word, the court's instructions as the "true" definition of "tribe". Unlike, for instance, explanations of "reasonable doubt", no one explanation of the *Montoya* definition can adequately serve in all cases at all times.

III.

Plaintiff next objects to the trial court's allocation of the burden of proof. The court instructed the jury that the plaintiff carried the burden of proof on every issue and that the defendant had no burden. "What this means is that if you are left in doubt as to a particular issue that is material, you must find for the defendant . . . ." Appellant contends that once it showed it was a tribe, the burden

should have shifted to appellee to prove that plaintiff voluntarily gave up tribal status.[9]

Appellant's first argument, and the only one clearly presented to the trial court,[10] is that 25 U.S.C. § 194 requires the burden to shift. That section provides:

> "In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."

Whatever the applicability of § 194 might have been in

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[9] The court did ease the plaintiff's task somewhat by instructing the jury that it could "infer that . . . conditions . . . tend to continue and change if they do change, gradually." Though the specific purpose of this instruction was to permit the jury to use evidence relating to general periods of time in deciding whether plaintiff was a tribe on the specific dates mentioned in the special verdicts, it permitted the jury to consider whether the defendants had presented evidence to show that conditions, once established, changed. The jury might have chosen, in effect, to shift the burden to defendants.

[10] Though defendants did not argue the point, it is questionable whether plaintiff preserved the burden of proof issue for appeal except as a matter of statutory law. Both the request for instructions and the objection to the instructions specifically referred to 25 U.S.C. § 194 as the grounds for plaintiff's version of the law. The Federal Rules of Civil Procedure, Rule 51, specifically require a party not only to object to an instruction, but to state the grounds for objection. A party cannot reserve grounds for objection in order to deprive the trial court of the opportunity to correct the instruction, thereby creating an appealable issue. "As a general rule, where a party fails to object to an instruction, we will not consider that objection upon appeal. *Stafford* v. *Perini Corp.*, 475 F.2d 507, 511 (1st Cir. 1973)." *Johnston* v. *Holiday Inns, Inc.*, 565 F.2d 790, 797 (1st Cir. 1977). The same rule can apply to limit parties to those grounds for objection preserved below. *See Sadaowski* v. *Bombardier Ltd.*, 539 F.2d 615, 624 (7th Cir. 1976); *Folkerson* v. *The New York, New Haven & Hartford RR.*, 188 F.2d 892, 896 (2d Cir. 1951). We discuss other arguments below because defendants do not raise the issue and because we consider the substantive issue important enough to err, if we err, in favor of deciding the merits.

a later stage of this case,[11] it was not of any relevance at this stage. There can be no presumption of title in plaintiff until plaintiff has proved it is an Indian tribe and was a tribe at each relevant date. As to these threshold questions, § 194 cannot aid the plaintiff.

In the alternative, plaintiff relies on general evidentiary principles for the same proposition.[12] Plaintiff, having established tribal status in 1834 and 1842, could not cease to be a tribe involuntarily. Therefore, plaintiff suggests, the defendants should have been required to prove that the termination of the tribe was voluntary. This argument is appealing. One of the few principles available to guide us is that normally the party asserting the affirmative of a proposition should bear the burden of proving that proposition. 9 Wigmore on Evidence § 2486, at 274 (3d ed. 1940). *See Pacific Portland Cement Co.* v. *Food Machinery & Chemical Corp.*, 178 F.2d 541, 547 (9th Cir. 1949); *Reliance Life Ins. Co.* v. *Burgess*, 112 F.2d 235, 237-38 (8th Cir.), *cert. denied*, 311 U.S. 699 (1949). Here defendants, by way of rebutting plaintiff's claim to be a tribe, argued that, assuming plaintiff was a tribe at some point, the tribe voluntarily gave up its separate status. If the jury did not find that the termination was voluntary, then it would have found the tribe still existed pursuant to the court's instruction that an abandonment must be knowing and willing and voluntary.

As Professor Wigmore noted, however, the affirmative allegation rule is not invariable.[13] In this case, plaintiff

[11] We need not decide whether an Indian tribe, as opposed to an individual Indian, may take advantage of the statute. Nor need we determine how to construe "white person".

[12] We have already rejected application of the specific law of abandonment, *supra*, note 7, and as plaintiff recognizes, merely labelling abandonment an affirmative defense does not advance the argument.

[13] 9 Wigmore on Evidence § 2486, p. 274 (3d ed. 1940). Even Professor Wigmore was forced to confess, "The truth is that there

could not avail itself of the Nonintercourse Act until it established that it either had always been or became and continued to be a tribe of Indians. Defendants denied plaintiff had ever been or continued to be a tribe. Defendants' case relied in part on evidence that the residents of Mashpee were not essentially different from other residents of Massachusetts, that they were assimilated into the general society and had abandoned tribal life. Consistent with the court's charge, plaintiff had an opportunity to rebut such evidence by introducing evidence showing that any abandonment was the involuntary product of outside coercion. The jury evidently found a change in status that was not involuntary, and, therefore, plaintiff stopped being a tribe.

So characterized, the voluntariness issue is part of the plaintiff's case. We think it fair that plaintiff bore the risk of nonpersuasion. If the jury found that plaintiff became assimiliated between 1842 and 1869, and if there were insufficient evidence either way or equally balanced evidence both ways as to whether or not the abandonment was voluntary, plaintiff would have failed to prove it was a tribe at a relevant time.[14] Moreover, plaintiff had an advantage because evidence of coercion from outside the community a century ago is more likely to be available today than is evidence of the state of mind of the individuals who changed their lifestyles. That is, historical records would reveal forced migrations, governmental

is not and cannot be any one general solvent for [allocating the burden of proof in] all cases. It is merely a question of policy and fairness based on experience in the different situations." *Id.*, at 275.

[14] The importance of the burden of proof is minimized in this case because each party presented some evidence relevant to the voluntariness of the tribe's change in status. Therefore, it is unlikely that the issue was decided for lack of evidence. The jury's problem was not so much weighing conflicting evidence as choosing between plaintiff's and defendants' interpretations of the historical data.

dealings, urban encroachments, the presence of outsiders, or other arguably coercive forces more readily than the important concerns or thought processes of the Indians. Consequently, in order to prove that abandonment was voluntary, defendants would probably have to try to prove a negative, the absence of coercion.[15] Therefore, we conclude that the court did not err in leaving the burden on the plaintiff.

IV.

Plaintiff argues that the special verdicts returned by the jury are irreconcilably inconsistent and fatally ambiguous. As a consequence, plaintiff suggests that it was error to enter judgment and that the only solution was to order a new trial. Where a trial court has entered judgment on the basis of a jury's special verdicts, "an appellate court must affirm if there is a view of the case that makes the jury's answers to the interrogatories consistent." *Atlantic Tubing & Rubber Co.* v. *International Engraving Co.*, 528 F.2d 1272, 1276 (1st Cir. 1976). This duty is drawn, at least in part, from the Seventh Amendment.

> "Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment." *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962).

We rule that the jury's answers can support the judgment.

The alleged inconsistency is that there is no evidence that

[15] This burden is placed on the government when it seeks to introduce a defendant's confession in a criminal case. *Miranda* v. *Arizona*, 384 U.S. 436, 475 (1966); *United States* v. *Christian*, 571 F.2d 64, 69 (1st Cir. 1978). But the defendant's right at issue is constitutionally protected, and the evidence available to the government is much fresher and more within the control of the burdened party.

could support the jury's conclusion that the tribe that existed in 1842 voluntarily abandoned tribal status at some time prior to 1869 when the jury found it was no longer a tribe. On the evidence of the case, viewed most favorably for defendants, the district court found that the jury could (though it was by no means compelled to) conclude that the tribe had assimilated into general non-Indian society, and that that assimilation was voluntary. *Mashpee Tribe* v. *Town of Mashpee, supra*, 447 F.Supp. at 948-49.

In agreeing with the district court on this issue, we stress that our review constrains us to look at that evidence and the inferences reasonably drawn therefrom which support the special verdicts. We add that there is not an abundance of evidence relating either to the external activities or internal attitudes of the Indians at Mashpee during this quarter of a century. Nevertheless, even apart from the burden of proof, which we have held to be correctly imposed on appellant, the evidence and inferences were sufficient to support a jury finding that what was a tribe in 1842 had voluntarily assimilated into the general society by 1869.

These are the factors on which we rest that conclusion.

— First, the same intense political activity that could have led the jury to find tribal existence in 1834 and 1842 was novel for the group and limited in time and scope of objective. The goal of becoming a district with certain rights of self-government was achieved in 1834. That of being permitted to divide common land among Indian members of the community was achieved in 1842. The jury could infer that the tribal organziation, having accomplished its purposes, became less important to the community.

— While the political structure of Mashpee, governed by "proprietors", remained essentially the same from 1834 to 1870, the jury could have found the seeds of change to have been sown when division of the common land was

authorized in 1842. There was evidence of substantial in- and out-migration throughout these years, the newcomers including Indians, white, and other non-white people, becoming both proprietors and tenants. Testimony of Mashpee inhabitants, both Indian and other non-whites, at a legislative hearing in 1869 revealed sad experiences in land use such as the gradual loss of the forests, inability to use the land as security for loans, and pauperization of non-Indian husbands of proprietors, observations suggestive not so much of tribal cohesiveness and communality as of individual aspirations and frustrations. Indeed, one of the speakers told of many young people who had left Mashpee rather than live on common lands and returned only after the law of 1842.

— The report of an 1869 legislative hearing on a petition to remove restrictions on the alienation of land and to grant citizenship could also have supported the special verdict. Two of the three Mashpee selectmen, with others, had filed the petition. Others opposed. At the hearing six spoke for removing restrictions, four spoke against, and one seemingly straddled. Of the four opponents, two took the position that action was premature and wanted from ten to thirty-four more years before full citizenship and freedom to alienate were given. In a straw vote 14 voted for removal of restrictions and 26 voted against removal, while the vote for immediate citizenship was 18 to 18. While this report shows a split opinion, the jury was entitled to give weight to the endorsement of removal of restrictions on alienation by a majority of the selectmen (and the reflection of the larger community of 300-400 Mashpee inhabitants), to the opinions of the two apparently most venerated leaders, who both wanted to secure equal rights without special restrictions and disagreed only as to the timing of the change, and to the vote of approval at the first meeting of the newly authorized town the following year. The desire of Mashpee residents to be able to alienate land, though not in itself inconsistent with tribal existence, could support the inference that the residents had begun to focus more on personal than communal advancement; more on the ability of individuals to compete as members of society than of the tribe to resist society's impositions.

— Under the court's instructions the jury was allowed to consider evidence of Mashpee life shortly after the terminal year, 1869. Such evidence as there was indicated that many of the young men were serving on vessels, and that farming, some manufacturing, a shipping enterprise, a hotel, and a burgeoning hunting and fishing business constituted the economy. Also, the town took over the remaining common land. From this too, particularly in the absence of any evidence tending to show a discretely "Indian" community, the jury could have inferred that Mashpee was voluntarily trying to carve a destiny like many another rural and coastal town; to change from an "Indian community" to a community that happened to be made up largely of Indians.

Neither party took the position at trial that the Mashpees' tribal status or lack of status changed in any significant way in the period between 1842 and 1869. Indeed defendants' counsel often spoke of the period from 1834 to 1870, during which Mashpee was a district, as a distinct era to be dealt with as one unit. Consequently, neither party focussed attention on the voluntariness of whatever changes did take place in Mashpee between 1842 and 1869. Nevertheless, the special interrogatories asked the jury to make a separate decision about each of the dates. Plaintiff cannot now take advantage of having failed to discuss a distinction that was apparent to the jury, and at least suggested in the court's instructions (see quotation in next paragraph).

The verdicts' alleged ambiguity derives from the following passage in the charge:

> "It is, I suppose, possible that by reason of circumstances, tribal existence be so suppressed that it be in limbo for a period, that it not be manifest for a period without there being abandonment. If you find that there was, by reason of the activities in 1869, 1870, a conscious abandonment of tribal status, then you would not be warranted in finding the existence of a tribe in 1976. However, if you find there was no such abandonment, then you should consider the [continuity] question."

Plaintiff suggests that if the jury thought tribal existence were temporarily suppressed in 1869 it would not know whether to answer the interrogatory yes (there was a tribe but it was suppressed) or no (temporarily there was no functioning tribe). The trial court agreed that this ambiguity was present at least as to the 1790 question, *Mashpee Tribe, supra,* 447 F. Supp. at 949,[16] but it did not address the possible ambiguity of any other answer.

First, we note that plaintiff did not point out the possible ambiguity during its objections to the instructions at the close of the charge. That was the appropriate time, and plaintiff then had all necessary information. General objections relating to the abandonment issue were not sufficient to give the court an opportunity to correct the charge, had it so desired, before the jury began deliberations. Unlike the alleged inconsistency in verdict, any ambiguity was discoverable on the face of the charge, and was not created by the verdict. The fact that this argument was not specifically made until the verdict had come in

[16] Massachusetts imposed a guardianship on the Mashpees in 1788. The court decided this ambiguity was immaterial, however, because 1790 was an irrelevant date. That conclusion is not challenged before us.

suggests that plaintiff did not consider this a problem until it discovered its case badly needed some new source of life.

Moreover, we are not persuaded that the interrogatory relative to 1869 was so ambiguous as to bar entry of judgment. The court clearly instructed that a tribe could cease to exist only voluntarily and that outside suppression would not constitute abandonment. "Abandonment cannot be found because of conditions which have been imposed from the outside." We must assume that the jury listened to and understood the court's entire charge. Therefore, if it thought that tribal existence were suppressed, the jury would have had to find that the tribe had not ceased to exist and would have answered "yes" to the interrogatory. The fact that the jury answered "no", as we have already discussed, is a legitimate verdict based on the jury's view of the facts. A new trial was not required on the basis of the special verdicts.

V.

Finally, plaintiff maintains that the trial court failed to investigate sufficiently the impact on the jury verdict of an anonymous phone call made to one of the jurors, and that a new trial therefore is mandatory. Although the trial court's inquiry was terminated too soon to have been fully satisfactory, we find that it acted within the bounds of its discretion in conducting the investigation as it did and that its conclusion that the communication was not prejudicial is supported by a record which "provides an adequate basis for review". *United States* v. *Doe,* 513 F.2d 709, 712 & n. 3 (1st Cir. 1975).

Approximately three months after the close of the trial, the court received a communication from one John Doe, a resident of Falmouth, Massachusetts, claiming that while riding a commuter bus during the time of the trial he had been approached by a man who identified himself as a juror in the Mashpee case and that the juror commented

that he had received an anonymous phone call about the case. The court promptly asked Mr. Doe to attend a hearing concerning his communication to the court and notified the parties. With counsel for both sides present, Mr. Doe testified as to the contents of his bus conversation with the juror, including his advice that the juror inform the court about the phone call. He also suggested, although somewhat unclearly, that the juror had engaged in a pattern of mentioning his involvement in the Mashpee case to other commuters.

The court then determined that a further inquiry was necessary and the next day a hearing was held with the juror in question, again with counsel in attendance. The juror testified that he had received the call, and had mentioned it to a fellow commuter but had not sought to inform the court about the incident. In response to the court's questioning, the juror stated that he had received the call about two or three weeks before jury deliberations in which the speaker said, "You know which way you better go" and then hung up. He did not recognize the voice, and testified that "the funny part about it" was that the caller did not indicate which "way" he should go. He also mentioned that he had received a series of calls in which he only heard a click as he picked up the receiver, both before and during his service as a juror, and that he had not been certain about the motivation for the calls. Finally, he maintained that he had never discussed the merits of the case outside of the jury room.

The court was unwilling to extend its investigation into several areas that plaintiff's counsel wished to explore. Although allowed, over defendants' over-zealous objections, to ask whether other jurors had told this juror that they had received calls, to which he responded in the negative, plaintiff's counsel was not permitted, again upon defendants' counsel's objection, to question whether this

juror had told other jurors about his anonymous phone call.[17]

While it clearly would have been better practice to have allowed this line of questioning, the court did satisfy itself that "while what happened was unfortunate and improper, it did not impeach the jury's verdict in any way at all", describing the phone call as "neutral" and not "prima facie prejudicial". The call was ambiguous, giving the juror no clues as to which way he should vote and not attaching any consequences to choosing the wrong way. *Compare Krause* v. *Rhodes*, 570 F.2d 563, 566 (6th Cir. 1977). It occurred several weeks before jury deliberations began and was not reported. The juror apparently drew no conclusions concerning its intended message, and our reading of the record indicates that not only was the juror not at all shaken by the experience but that he seemed to attach little significance to it.[18] *Compare Remmer* v.

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[17] Defendants, in their briefs, suggest that the court did in fact ask the juror whether he had told other jurors about the phone call, pointing to this question: "[What is] your best recollection, whether you talked to one person or more than one person on this subject?" As the record clearly shows, this question was a rephrasing of opposing counsel's inquiry concerning communication to other passengers on the bus, and not other members of the jury panel. This misconstruction of the record, it seems to this court, cannot be explained on any excusable basis.

[18] We are somewhat puzzled by the court's statement to counsel that:

> "The only thing that would seem to me to be left and asked of the juror is whether his decision on the case was affected by the call which seems to me not an inappropriate question at this point, but it is my present disposition to bring this inquiry to a close. I'm satisfied that while what happened was unfortunate and improper, it did not impeach the jury's verdict in any way at all."

It would have been preferable for the court to ask the juror this obviously relevant question. But, given counsel's failure to pursue the question suggested by the court, indicating to us that it was apparent that the effect of the call on the juror was minimal, and the court's conclusion that the incident was insufficient to upset the jury process, based in part on the juror's demeanor, we do not consider the omission a fatal one.

United States, 350 U.S. 377, 381-82 (1956), *and United States* v. *Spinella*, 506 F.2d 426, 428 (5th Cir. 1975) *with United States* v. *Brumbaugh*, 471 F.2d 1128, 1130 (6th Cir. 1973). His only concern was that the court understand that he never intended to act improperly, stating that he had "peace of mind" concerning the trust the court had placed in him as a juror. Furthermore, his testimony that none of the other jurors had mentioned having received a call at least suggests that the subject of phone calls had not arisen in discussions among the jurors. But even if we assume that had the obviously proper question been asked the juror would have responded that he had told his fellow jurors of the call, because of the remoteness in time, the isolated nature of the call, the ambivalence of the message conveyed, and the lack of identifiable source and threatened consequences, we are unable to say, or to find authorities which under similar facts have held, that plaintiff "was deprived of a fair trial and an impartial jury". *United States* v. *Doe*, *supra*, 513 F.2d at 713. *See Allen* v. *United States*, 376 F. Supp. 1386, 1390 (E.D. Pa. 1974), *aff'd*, 511 F.2d 1392 (3d Cir. 1975).

Plaintiff contests several other restraints placed upon the investigation by the court, maintaining, first, that the court should have called in the jury members to determine whether they had received similar communications during the trial and, second, that the court should not have ordered counsel to refrain from making an independent investigation into whether the juror in question had had impermissible conversations with other passengers on his commuter bus. We reject both contentions. First, it was well within the court's discretion to refuse to question other members of the jury panel. Plaintiff's assertion that the call received by this juror was *prima facie* evidence of possible calls made to other jurors and thus necessitated further inquiry is unpersuasive. The juror testified that no other juror

had mentioned having received a communication, giving the court reason to believe that the calls had been limited to this one juror. Moreover, as the court explained at the inquiry, this juror was the only member of the panel who was residing in the area that was being contested in this law suit, and thus was a particularly likely target for crank calls. *See Allen* v. *United States*, *supra*, 376 F. Supp. at 1388-90.

We also find that the district court acted within its discretion when it strongly discouraged counsel from independently investigating possible further misconduct on the bus[19] and refused to pursue the inquiry itself. It is true that Mr. Doe, the commuter who brought this matter to the attention of the court, testified that this juror had discussed the case with other passengers on the bus, although he could say nothing about the content of those alleged conversations, noting that he "was asleep most of the time". The juror, however, flatly denied having ever mentioned more than the fact that he was on the jury and testified, "[t]his case per se, merits, any testimony, anything said in the courtroom, I never discussed it or not knowingly anything that would be — I've been fairly discreet, I believe, most discreet." The court expressly found Mr. Doe to be an unreliable witness, and stated, "The juror strikes me as a pretty solid [person], and I don't think there is anything to suggest he was doing anything improper." The court was in a position to evaluate the demeanor and credibility of both witnesses, *see United States* v. *Brumbaugh*, *supra*, 471 F.2d at 1130,

[19] The court did not, as plaintiff suggests, order counsel to refrain from an independent investigation. At one point he so "instructed" him but later stated that "I think that would be a very, very foolish thing for you to do, . . . extremely foolish. If you insist on doing it, you may have a right to do it, but I think it would be very bad judgment."

and to conclude that no further inquiry into events on the bus, by the court or counsel, was warranted.

VI.

Having rejected each of plaintiff's assignments of error, we must affirm the judgment of the district court. Defendants' separate appeal in Nos. 78-1273 and 78-1274, therefore, need not be decided. Defendants appealed from the district court's construction of the "white settlements" exception to the Nonintercourse Act. *Mashpee Tribe, supra*, 447 F. Supp. at 950. We reject defendants' suggestion that we should afford them an advisory opinion on the subject because of its intrinsic importance and possible relevance to other suits now pending or soon to be filed.

Affirmed, except as to that part of the judgment below of which prosecution of the appeal was deferred by order of this court entered August 11, 1976. One third of their costs to defendants.

BOWNES, *Circuit Judge*. (concurring) I concur with my brothers in all but one respect of the opinion, namely its treatment of the lower court's instructions on the definition of "tribe." The majority suggests that it is not ruling on whether the instructions are correct as a matter of law, but simply ruling that the instructions conform to the plaintiff's view of the law. *Ante* at 20. There is an understandable reluctance not to be placed in a straightjacket by embracing one definition for all time and for all circumstances. However, I believe that the district court's instructions were correct as a matter of law, that they comported with the applicable standards as set forth in *Montoya* v. *United States*, 180 U.S. 261, 266 (1901), and that we have a duty to find the instructions legally correct or incorrect and not merely whether they harmo-

nized with one party's view of the appropriate legal standards. Both the district court's delineation of what constitutes "tribe" as well as this court's extensive explication should, in my opinion, serve as a firm foundation for future cases dealing with this sensitive and difficult issue. I would not shy away from reliance on these instructions and our comments thereon in future cases.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MASHPEE TRIBE,
PLAINTIFF

v.

CIVIL ACTION
No. 76-3190-S

TOWN OF MASHPEE, ET AL.,
DEFENDANTS

Memorandum and Order for Judgment.

March 24, 1978.

SKINNER, D.J.

This action was brought by the Mashpee Tribe of Indians to recover possession of tribal lands allegedly alienated from the tribe in violation of the Indian Nonintercourse Act (25 U.S.C. § 177). The defendants' answer put in issue whether the plaintiff group was in fact an Indian tribe for purposes of the Act at the time suit was brought and at other times deemed by the parties to be critical. The threshold issue of tribal existence was severed for separate trial by order of the court.

After forty days of trial, the issue of tribal existence was submitted to the jury in the form of special interrogatories. The issue of tribal title was reserved as a matter of law for the court to resolve after receiving the jury's answers. The dates chosen in the special interrogatories were those deemed significant by the parties with respect to their several legal theories. I am of the opinion that several of these dates are not significant, as

shall hereinafter appear, but they were included to preserve the widest possible scope of review of the legal issues. The interrogatories and answers were as follows:

1. Did the proprietors of Mashpee, together with their spouses and children, constitute an Indian tribe on any of the following dates:

a. July 22, 1790: The date of the enactment of the first version of the federal Nonintercourse Act?

No

b. March 31, 1834: The date on which the District of Marshpee was established. [sic]

Yes

c. March 3, 1842: The date on which formal partition of land in the District of Marshpee among the proprietors of Marshpee and their children was authorized by act of the legislature of the Commonwealth of Massachusetts?

Yes

d. June 23, 1869: The date on which all restraints on alienation of land held individually by Indians and people of color known as Indians were removed by act of the legislature of the Commonwealth of Massachusetts?

No

e. May 28, 1870: The date on which the Town of Mashpee was incorporated by act of legislature of the Commonwealth of Massachusetts: [sic]

No

2. Did the plaintiff group, as identified by the plaintiff's witnesses, constitute an Indian tribe as of August 26, 1976: The date of the commencement of this law suit?

No

3. If you find that people living in Mashpee constituted an Indian tribe or nation on any of the dates prior to August 26, 1976 listed in Special Question No. 1, did they continuously exist as such a tribe or nation from such date or dates up to and including August 26, 1976?

No

The case is now before me on the defendants' motion for judgment of dismissal on the merits based on the jury's answer. Plaintiff has filed an opposition thereto claiming that the jury's answers are fatally inconsistent and on their face violate the court's instructions. It appeared at argument that the plaintiff's preferred remedy is a new trial, and that indeed appears to be the only alternative to the entry of judgment for the defendants. All parties agree that the plaintiff must establish its status as an Indian tribe as of the date that the action was commenced in order to maintain this action in the form elected by the plaintiff.

I. Historical Background.

The basic history of Mashpee is not disputed, and a review thereof is necessary to the resolution of the pending motions. For simplicity's sake, I shall refer to the people claiming to be a tribe and their Indian ancestors as Indians[1] and everybody else as non-Indians, except where it is necessary to differentiate non-Indians of African and European ancestry who will be referred to respectively as blacks and whites. References to statutes and deeds in the following exposition include my legal interpretation and construction, to which the parties do not in every case agree.

In 1665, [Richard] Bourne, a Christian missionary to the Indians, desired to gather a community of Christian Indians in the area surrounding the Indian village of Mashpee and comprising the present Town of Mashpee and parts of present Sandwich and Falmouth. Accordingly, a deed was executed from two Indian leaders named Weepquish and Tookenchosen to five other named persons for the benefit of the "South Sea Indians." The status of the grantors and their capacity to grant title is unknown. One of the expert witnesses gave an opinion that the grantees were a group of village headmen who constituted the ruling council of a tribe known as the Cotichesetts, inhabiting the area of Mashpee and eastward to present Hyannis. The area granted contained a group of small villages of ten or twenty families, the remnants of a once numerous and thriving agricultural community largely wiped out in 1617 by an unidentified epidemic.

In 1666, Quichatisset, the sachem of Manomet, relinquished his authority over the area and its inhabitants by a deed to substantially the same grantees. There is no evidence as to the

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[1] I recognize that the plaintiff's claim of being Indian is contested by the defendants, and that the evidence indicates considerable racial mixture among this group.

form of governance of the area or its inhabitants from this period until 1723.

In 1685, apparently at the instance of Shearjashub Bourne, the son of [Richard], the General Court of the Plymouth Colony granted the area to the South Sea Indians *and their children*, subject to a restraint on alienation, namely, that no land should be sold to an Englishman without the consent of all the Indians and the permission of the General Court.[2] It is on this grant that the plaintiff must base its claim of title. *Johnson* v. *McIntosh*, 8 Wheat 543 (1823). In 1692, the Plymouth Colony was merged with the Province of Massachusetts Bay, and the powers of its General Court were preempted by the General Court at Boston.

By 1723, Mashpee had been organized as a proprietary. As a result of the 1685 deed, Mashpee differed from other proprietaries in an essential respect. Mashpee was designed to be a permanent Indian plantation, in which the land was to be held in common, entailed, and with a restraint on alienation into the indefinite future. Other proprietaries were designed for founding and developing new communities. They were self-liquidating. The common land of the proprietary was sold off to settlers who organized towns. In 1746, the General Court appointed guardians to control the finances of the plantation.

These guardians apparently used their position to exploit their wards, and the efforts of the Indians to obtain redress through the General Court were unavailing. By a remarkable

[2]Plaintiff's Exhibit 38: "The Court, on considerations of the p'mises, doth soe far confirme said land to the said Indians, to be perpetually to them & their children, as that no part of them shall be granted to or purchased by any English whatsoeuer, by the Courts allowance, without the consent of all the said Indians." The case has been tried, and I think properly so, on the assumption that "English" should be broadly construed to include all non-Indians.

feat of daring and resolve, one of the Indians (a Mohegan Indian from Connecticut, who had settled in Mashpee) carried a petition to the King of England. As a result, in 1763, the Mashpee Proprietors were given a large measure of self-government, including the right to appoint constables to protect their woodlots from depredation by neighboring non-Indian settlers.

During the Revolutionary War, the Indian men of Mashpee fought against the British, and a very large number of them were killed. After the war, there were said to be 70 widows in Mashpee out of a population of a few hundred. As one might suppose, this situation encouraged a considerable influx of unattached non-Indian males, mostly black, but including four escaped Hessians and a Portuguese sailor.

This influx apparently had a disintegrating effect, as a result of which the General Court reimposed guardians, whose approval was required for all significant actions.

By 1833, as under the previous guardians, the Indians felt that the guardians were not protecting them, but exploiting them. The precipitating issue was the cutting of wood from Indian land by outsiders. There was some violence. The Indians hired a lawyer and filed a petition with the General Court for relief from the guardianship. At the same time, the Indians rejected the ministry of the Reverend Phineas Fish, who had been sent down from Harvard to carry on "the blessed work of converting the poor Indian," and established their own Baptist Church under an Indian preacher, "Blind Joe" Amos.

In response to this well organized effort, the General Court created the District of Mashpee in 1834. Under the district organization, Mashpee (or "Marshpee") was governed substantially in the manner of a Massachusetts town, with the exception that certain transactions affecting the common lands and the treasury were subject to the approval of a Commis-

sioner appointed by the Governor. The Commissioner also served as Treasurer. By successive legislation, the Commissioner's power was reduced to that ordinarily exercised by a Town Treasurer and eventually the office was filled by election of the proprietors of the district.

The 1834 Act also confirmed the allotment of land to those proprietors who had occupied and improved it, and required the Commissioner to keep a record of the allotments, as well as a list of proprietors. All of the land in the district, whether held in common or in severalty, was exempt from execution, and the proprietors were exempt from state and county taxes.

From 1834 onward, records of the district show that the proprietors voted various ordinances, including regulation of herring fishing. There are no existing records showing such regulations prior to this time.

In 1842, the General Court passed another Act which substantially altered the land title within the district and defined who were to be deemed proprietors. Each proprietor was to be allotted a sufficient portion of the common land of the district to bring his holdings (including the acreage confirmed to his use by the 1834 Act) up to sixty acres. All the land not so allotted remained common land under the control of the Selectmen of the District. The title acquired by each proprietor was described in Section 8 of the Act as follows:

> The lands set off in severalty to the proprietors, and all other lands held or acquired by them, shall have all the incidents of estates in fee, except the right of transfer, conveyance or devise to other than a proprietor, and excepting further, that the said lands shall not be liable to be taken in execution; . . . [various detailed provisions for allotment, and for the preservation of the rights of minors] . . . And no land now belonging to a married female proprietor, or which may be allotted to her, or

> which she may hereafter acquire or inherit in her own right, shall, without her consent, be conveyed or leased, or the wood sold therefrom; and all contracts therefor by her husband, in which she does not join, shall be void: *provided, also,* that upon the death of any proprietor leaving no heirs, all his interest in the lands of the district shall escheat to the proprietary.

In 1869, the Governor of the Commonwealth proposed legislation relieving all the Indians in Massachusetts of their legal disabilities and admitting them to full citizenship. A legislative committee held a hearing in Mashpee. The questions being considered were citizenship and removal of the restraints on alienation of the land. About 40 people appeared, including several non-Indian husbands of female Indian proprietors. Some of the Indians were in favor of citizenship and removal of the "entailments" on the land, because under existing restrictions there was no way that an Indian could acquire mortgage money for improvements, or liquidate his land holdings to go into commerce. The non-Indians also favored elimination of restraints on alienation because they wished to be able to vote and hold property in Mashpee in their own right. "Blind Joe" Amos, by then describing himself as among the oldest inhabitants, opposed the changes on the ground that the Indians were not yet ready to deal on an equal footing with outsiders and would imprudently sell off all their land. He was in favor of the removal of the restrictions, but not until the generation then in school should come of age. A vote was taken which was split 18 to 18 on the question of citizenship and 26 to 14 in opposition to the removal of the restrictions on the land. (Plaintiff's Exhibit 180, "Phonographic" Transcript of Hearing.)

Nevertheless, in 1869 the General Court passed an act granting citizenship to the Indians, removing their legal disabilities, and releasing the restraints on alienation of land imposed originally in the 1685 deed and carried forward in the 1842 Act. In 1870, Mashpee was incorporated as a Town. The common land of the District was transferred to the Town, and upon application the Superior Court was authorized to order the sale thereof by Commissioners appointed for the purpose. There were some three thousand acres of common land remaining after the allotments of 1842. Most of this land was sold, presumably to the then inhabitants of Mashpee. *See Coombs, petitioner*, 127 Mass. 278 (1879).

It is these two acts of the General Court that the plaintiff complains of as violations of the Nonintercourse Act.

At this point, the ancestors of the present Indians had complete control of substantially all of the land in Mashpee, and they retained it for the next seventy years. "Blind Joe" Amos' prediction did not come true. The Selectmen of the District became the Selectmen of the Town, and the Board was composed of Indians until 1968,[3] and a majority were Indians until 1972.

In the early part of the 20th century, it appears that some small part of the Town was sold to outsiders and developed as summer property. Up through the 1930's and early 1940's, however, the area remained substantially as it had been from the 1870's on. Indian witnesses testified that when they were growing up in Mashpee the land was still open and unfenced by its Indian owners, and the upland and shores were readily accessible to everyone for hunting, shellfishing and recreation.

By the 1930's, however, agriculture in New England was in general decline, and so it was in Mashpee. Some land was taken from Indian owners by the Town for taxes, but at least

[3] With one exception in the early 20th century.

some tax title property was purchased at tax title auction by other Indians.

In the early 1950's and thereafter, the building of super highways to Cape Code and the pressure of population moving out from the cities encouraged land developers to buy land on Cape Cod and in Mashpee. Some of the Indians sold their land during this period, and some retained their land. While each land sale doubtless appeared profitable to the individual seller at the time, the Indians now find that the aggregate of these land sales has substantially altered the life of their community, leaving them in the minority. The free access to upland and shore that they so long enjoyed has disappeared.[4]

It is principally these land sales by individual Indians to non-Indians which the plaintiff seeks to have declared null and void as in violation of the Nonintercourse Act.

There was virtually no evidence introduced concerning life in Mashpee between 1870 and 1920. There was evidence that several students at the Carlisle Indian School had given "Mashpee" as their tribal designation during this period, but also that the grandfather of one of the witnesses had deliberately refrained from teaching his children the Indian language, because he wanted them to use English.

In 1920, there was a revival of interest in Indian customs. From 1928 to the present, there has been a "Pow-wow" held at Mashpee, more or less annually. This is a three or four day celebration featuring Indian dances and songs. Most of these are borrowed from Plains Indians, however, as are many of the decorative symbols and styles of dress, because the ancient modes of east coast Indians have been lost. From the early 1920's through the early 1940's, there were individuals who

[4] This history parallels that of most small towns in eastern Massachusetts and Rhode Island, and more recently in southern Vermont, New Hampshire and Maine.

were sometimes recognized as chiefs and medicine men of the Indian community in Mashpee. The method by which the individuals were selected and their leadership functions were not revealed by the evidence. In 1956 the Sachem of the Wampanoag Nation appointed Earl Mills Chief of the "Mashpee Tribe," on the petition of some of the Indians in Mashpee. Mr. Mills remains the Chief to this day. Mr. John Peters was similarly appointed as Medicine Man and filled that post up until the time of trial, when he was appointed Supreme Medicine Man of the Wampanoag Nation. At one time there was a Tribal Council which met from time to time, but it appears that this groups' [*sic*] function, if any, was primarily social. In 1974 the Mashpee-Wampanoag Indian Tribal Council, Inc., was incorporated. It has acted as representative for the Indians in Mashpee with respect to securing federal educational grants and Comprehensive Employment and Training Act projects, and has been designated as the official representative of the Mashpee Indians in an executive order of the Governor of the Commonwealth. It lobbied for the passage of the executive order, and also secured the title to fifty-five acres of land in Mashpee granted to it by the Town, to be used for tribal purposes.

The leadership functions of the chief, the Medicine Man and the incorporated Tribal Council, and the extent to which these individuals and the corporation were recognized as significant leaders by the Indians, were the subject of extensive and conflicting testimony.

II. Significant Times.

As stated, the deisgnation of the various times in the interrogatories to the jury was intended to preserve the rights of the parties with respect to their legal arguments. There is no

doubt, and no disagreement, about the significance of August 26, 1976, the date that this action was commenced, because the right sought to be enforced is exclusively a tribal right.

The defendants claim that 1790 is a critical date because the original trade and Intercourse Act and its successors only deal with tribes existing at the time of original enactment. They go further and assert that the Congressional power to "regulate Commerce . . . with the Indian Tribes" granted in Art. I, § 8, cl. 3, restricts congressional action to existing tribes. It is doubtful if authority to regulate Indian affairs is limited to the Commerce Clause, but, in any case, the defendants' position flies in the face of a basic canon of construction of organic law. There is no support for it in the cases; in fact, quite the contrary, *e.g.*, *Oliphant* v. *The Suquamish Indian Tribe*, 46 L.W. 4210 (U.S. March 6, 1978). In my opinion, the 1790 date is entirely without significance in this case.

The plaintiff insists that 1869 and 1870 are crucial dates. Since the jury's return the defendants have enthusiastically joined in this position. If the proprietors of Mashpee were a tribe in 1870, the common land held by the District of Mashpee would very likely be tribal land, and its division or sale pursuant to the statute of 1870 might well have been a violation of the Nonintercourse Act. In my opinion, 1870 is significant with respect to approximately three thousand acres[5] of the former common land, but not in any other respect.

With respect to the allotted land, however, the 1869 statute was in effect a release by the successor of the original grantor of a restraint on alienation included in the 1685 deed from the General Court of the Plymouth Colony. It might also be perceived as a grant of a right of free alienation, but it was a grant

[5]The location of these acres was not revealed in any evidence adduced at this stage of the case.

that flowed *to* the Indians not *from* the Indians. It flowed not to an Indian nation or tribe of Indians, but to individual Indian holders of estates in fee. It is only a "purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians," that is invalidated by the Nonintercourse Act. None of these occurred in 1869, and 1869 is therefore not a significant date.

The statute of 1842, in contrast, did bring about a basic change in the title to the land in Mashpee. Common land was converted by operation of the statute into land held in severalty. If, as the jury determined, the proprietors constituted an Indian tribe at this time, what I assume was tribal land was perforce conveyed to individual Indians. The plaintiff does not wish this to be considered a critical date, because if it is, the operation of the Nonintercourse Act invalidates the title of the Indians themselves, some of whose present titles doubtless derive directly from the original proprietors. (Other present-day Indians own land in Mashpee which they bought from non-Indians; their title is, of course, no better than that of the non-Indians in their chain of title.) The Nonintercourse Act does not by its terms provide for any exception for the conveyance of land from a tribe to individual Indians, and plaintiff has cited no case creating a judicial exception. 1842, therefore, is a significant date.

The 1834 Act presages the 1842 disposition of the land, but, while it provides for permanent, transferable rights of use and occupancy, it does not, strictly speaking, affect title. Use and occupancy are interests in land nevertheless, and 1834 may be a significant date to that extent. There was some evidence that allotment of tribal land for the use and occupancy of particular families was characteristic of tribally held land and not inconsistent with tribal title. Whatever significance the 1834 Act may have had seems to me to have been subsumed in the 1842 statute.

The significant dates are therefore 1976 and 1842, and 1870 as to approximately three thousand unidentified acres.

III. Inconsistency of Responses and Confusion of Jury.

Plaintiff's attack on the jury's finding that it was not a tribe in August of 1976 is not based on the evidence adduced with respect to 1976, but on the assertion that the pattern of the jury's other answers fatally impeach that finding. The argument has two branches:

1. There was no material change in the circumstances of the Mashpee proprietors between 1842 and 1869 which warrants the jury's finding that they were a tribe in 1842 and were not in 1869. Since I had instructed the jury that tribal status once abandoned could not be regained, the mistake with reference to 1869 required a negative answer with respect to 1976. Thus the answer with respect to 1976 cannot be the basis of a judgment adverse to the plaintiff.

2. The finding of the jury that the proprietors were not a tribe in 1790 is inconsistent with the finding that they were a tribe in 1834. Plaintiff claims that the instructions limited the time for the emergence of a tribe to the period before 1723. The proprietors would not therefore have become a tribe between 1790 and 1834. The finding thus reflects either a misunderstanding of the instructions, or a refusal by the jury to abide by them, either of which vitiates all of the jury's answers including the answer that the plaintiff was not a tribe when the suit was commenced in 1976.

IV. Opinion.

In my view, the evidence would support the jury's finding that between 1842, when the Indians in Mashpee were active in establishing self-determination and asserting their right to their own customs, and 1869 when the legislative hearing was held, the proprietors had reoriented their efforts toward assimilation into the general non-Indian community. This is arguably the tenor of the 1869 statements, the differences between the speakers involving only the timing of the proposed changes. (Plaintiff's Exhibit 180.) I instructed the jury that they could also consider the events of the immediately prior and succeeding years in evaluating the situation at any one of the given dates, insofar as they bore on the attitude and customs of the Indians. The absence of any indication of Indian self-identification, or of the establishment of tribal common land in the years immediately following 1869, at a time when the Indians exercised virtually complete control of the area, may have had some bearing on the jury's response. From all of the circumstances, the jury was entitled to find that tribal identity had been abandoned at some time between 1842 and 1869.[6]

The basis of the plaintiff's argument with respect to 1790 is the following section of the original instructions to the jury:

> You may also consider whether the group started off in 1665 as a mere remnant or an accumulation of Indians from here and there and acquired a tribal status by reason of organizing itself in a tribal manner, somewhere in the course of time between 1665 and 1723. [Tr. 40-53, 1. 1-6]

[6]These various instructions, including the instruction that tribal status may be abandoned, are challenged by the plaintiff as a matter of law, but I have in effect already ruled on these matters.

The plaintiff treats this statement as a limitation. It seems to me that the word "also" defeats that interpretation, but the lack of further amplification certainly left the matter unclear at that point.

Unfortunately, during the long colloquy with counsel after the instruction, confusion was compounded by my contradictory statements regarding the foregoing, neither of which were correct statements of the applicable rule. [Tr. 40-107, 1. 1-2; Tr. 40-86, 1. 8-13.] Fortunately, these statements were out of the presence of the jury, and could not have affected their answers.

In any case, the supplementary instructions permitted the jury to find the evolution of a tribal organization occurred at any time "in their course of history." [Tr. 41-17, 1. 16 through 41-18, 1. 11.] This answers the plaintiff's objection.

There remains yet one more ambiguity in the jury's 1790 answer, however, which should be pointed out, even though in my opinion it is of no consequence. The 1790 date falls just after the imposition of guardians under the statute of 1788. I advised the jury that an involuntary repression of tribal activity would not constitute an abandonment of tribal existence, but I did not say how they should answer if they found that such repression did exist; *i.e.*,

> *Yes* (there was a tribe, but it was unable to function)
>
> or
>
> *No* (There was not a functioning tribe for the time being)

The jury's actual negative answer is therefore susceptible to two interpretations:

(1) That the tribe did not evolve until sometime after 1788.

(2) That the tribe had evolved sometime prior to 1788, but was in temporary eclipse because of the guardianship.

On the evidence the latter is the more likely conclusion, but there is no way of telling what the jury thought.

In my considered view, it doesn't matter, because as I have said, 1790 is in my opinion a totally irrelevant date. The answers of the jury are perfectly rational under either view, and do not reflect such lack of understanding or lack of compliance with the instruction as to vitiate the remaining answers.

Aside from all of these problems, the answer of the jury that the plaintiff was not a tribe for purposes of the Nonintercourse Act[7] in 1976 was fully supported by the evidence of the circumstances of the plaintiff's existence in Mashpee at that time.

V. Order.

Accordingly, the answers of the jury to the special interrogatories shall stand. These answers require that this action be

[7] The standards of that Act, at least as I have interpreted it, require that a tribe demonstrate a definable organization before it can qualify for the extraordinary remedy of the total voiding of land titles acquired in good faith and without fraud. Nothing herein, or in the answers of the jury, should be taken as holding or implying that the Mashpee Indians are not a tribe for other purposes, including participation in other federal or state programs, concerning which I express no opinion.

DISMISSED on the merits, the plaintiff not having established its standing to bring suit as an Indian tribe.

So Ordered.

WALTER JAY SKINNER,
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MASHPEE TRIBE,
PLAINTIFF

v.

CIVIL ACTION
No. 76-3190-S

TOWN OF MASHPEE, ET AL.,
DEFENDANTS

Erratum.

March 24, 1978.

SKINNER, D. J.

The references to James Bourne on p.4 of the Memorandum and Order dated March 24, 1978 are in error. The proper references are to Richard Bourne.

WALTER JAY SKINNER,
U.S. District Judge

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-61

TOWN OF MASHPEE, ET AL., *Petitioners,*

v.

MASHPEE TRIBE, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully prays that the writ of certiorari sought by the cross-petition in this case be denied for the following reasons.

ARGUMENT

1. The issue raised (divided by petitioners into three) was not reviewed by the Court of Appeals, so that review by this Court is not yet appropriate. Pet. 40a.

2. The decision of the District Court was correct. As petitioners note, the District Court's decision on this issue was based on a like determination by the court in *Narragansett Tribe of Indians* v. *Southern R.I. Land Dev. Corp.*, 418 F.Supp. 798, 808-09 (D.R.I. 1976). That court held that the exception for Indians "surrounded

by settlements" of U.S. citizens did not apply to claims of tribes under the Nonintercourse Act. That conclusion was correct for the following reasons.

A. The exception originated with the 1793 Indian Trade and Intercourse Act, 1 Stat. 329.[1] It was reenacted without change in the Acts of 1796, 1 Stat. 469 § 19; 1799, 1 Stat. 743 § 19; and 1802, 2 Stat. 139 § 19. The legislative history of the 1793 Act indicates that the use of the word "Indians" in the exception was a deliberate substitution for the words "any tribe." The original bill which became the 1793 Act had excepted trade and intercourse with "any tribe" surrounded by citizens settlements. The bill was amended before passage to substitute the word "Indians." National Archives Record Group 46, Records of the Senate: Original Bill and Amendments.

B. The Nonintercourse provisions of the 1793-1802 statutes required that Congress control extinguishment of the land title of "any Indian, or nation, or tribe of Indians, within the bounds of the United States." 1 Stat. 329 § 8 (1793); 1 Stat. 469 § 12 (1796); 1 Stat. 743 § 12 (1799); 2 Stat. 139 § 12 (1802). Both tribal and individual title were protected, while the citizens settlements exception excluded only individual Indians.

Petitioners argue that the words "any Indian" have the same meaning as "Indian tribe." Pet. 13. But in 1833 Attorney General Taney held, to the contrary, that it was the words "any Indian" that brought individual Indians within the purview of the Nonintercourse Act, and in 1834 Congress eliminated the protections for individual Indians by deleting these words. 2 Op. A.G. 587 (1833). *See also Jones* v. *Meehan,* 175 U.S. 1, 12-13 (1899).

[1] The Act of 1790, 1 Stat. 137, contained a similar exception but only from the particular terms of § 1, concerned with licensing of trade in goods with Indians. That origin suggests that such trade was at least the dominant reason for the exception.

Petitioners invoke this Court's decision in *Wilson* v. *Omaha Indian Tribe,* —— U.S. —— (June 20, 1979), where the Court held that the words "Indian" and "Indians" in section 22 of the 1834 Trade and Intercourse Act (25 U.S.C. 194) (which places the burden of proof on the "white person" in certain cases involving Indians) include tribal land holdings. That conclusion is distinguishable, however. It concerned a different section, which originated at a different time (1822). The Court construed the section to effect its purpose and refrained from applying the conclusion even to the one other section of the 1834 Indian Trade and Intercourse Act, which also referred to "white persons." *Cf.* concurring opinion in *Wilson* v. *Omaha Indian Tribe, supra.* Unlike the instant case, there was no helpful legislative history for § 22. The purpose of the Nonintercourse Acts was to assert a congressional monopoly over tribal title. *Oneida Indian Nation* v. *County of Oneida,* 414 U.S. 661 (1974). This purpose is totally frustrated by petitioners' interpretation. If the citizens settlements exception applied at all to the Nonintercourse Acts, it was a proviso creating an exception to their policy and must be strictly construed. *United States* v. *McElvain,* 272 U.S. 633, 639 (1926).

C. The foregoing analysis is reinforced by the terms of the 1834 Indian Trade and Intercourse Act, 4 Stat. 729. When the Nonintercourse provision was amended to apply only to tribes (§ 12, now 25 U.S.C. 177), the

citizens settlements exception was deleted. *Jones* v. *Meehan, supra.*

D. An independent reason why the conclusion below was correct is that the federal policy disabling tribes from conveying land to anyone except the United States or with its approval exists independently of the statutes. In *Johnson* v. *M'Intosh,* 21 U.S. (8 Wheat.) 543 (1823), this Court invalidated land purchases from Indians made in the 1770's, before passage of the Nonintercourse Acts. In two 1978 decisions, the Court expressed the view that when the tribes came under the sovereignty of the United States, their ability to transfer land was "implicitly lost by virtue of their dependent status." *United States* v. *Wheeler,* 435 U.S. 313, 326 (1978); *see, Oliphant* v. *Suquamish Indian Tribe,* 435 U.S. 191, 209 (1978). In *Oneida Indian Nation* v. *County of Oneida,* 414 U.S. 661, 667 (1974), the Court said:

> Once the United States was organized and the Constitution adopted, these tribal rights to Indian lands became the exclusive province of federal law . . .

E. Another basis for the conclusion of the District Court on this issue was the additional requirement of the exception that the Indians be within the "ordinary jurisdiction" of the state. The court recognized that the Mashpees were governed by special laws and were not within the ordinary jurisdiction of Massachusetts until the last state act taking their lands made them so. Tr. 23-123.

3. Petitioners make an erroneous claim about the nature of the issue they raise. They say that cases such as this one based on the Indian Nonintercourse Act (25 U.S.C. 177) had been "exceedingly rare" east of the

Mississippi until "recently." Pet. 7-8. We do not know the standards for this claim, but it seems untrue based on reported decisions alone. *See, The New York Indians,* 72 U.S. (5 Wall.) 761, 771 (1867); *United States* v. *Boylan,* 265 F. 165 (2d Cir. 1920), *appeal dismissed,* 257 U.S. 614; *Deere* v. *St. Lawrence River Power Co.,* 32 F.2d 550 (2d Cir. 1929); *United States* v. *7405.3 Acres of Land,* 97 F.2d 417 (4th Cir. 1938); *United States* v. *National Gypsum Co.,* 141 F.2d 859 (2d Cir. 1944); *Tuscarora Nation of Indians* v. *Power Authority,* 257 F.2d 885 (2d Cir. 1958); *Federal Power Com'n* v. *Tuscarora Indian Nation,* 362 U.S. 99 (1960); *United States* v. *Devonian Gas & Oil Co.,* 424 F.2d 464 (2d Cir. 1970); *Oneida Indian Nation* v. *County of Oneida,* 414 U.S. 661 (1974).[2]

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[2] Petitioners also refer to a statute of limitations respecting actions by the United States on behalf of Indians and recite an Interior Department figure on claims which could be affected as "well over 1,000." Pet. 14-15, n. 3. This statement is highly misleading. The statute, 28 U.S.C. 2415, limits all tort and contract claims by the United States on behalf of Indians. It expressly excepts actions for recovery of real property. 28 U.S.C. 2415(c). The estimate of affected cases includes trespass and other claims of every sort. Only a small number of those involve claims that land conveyances are void under the Nonintercourse Act.

CONCLUSION

For the reasons stated, the cross-petition for a writ of certiorari should be denied.

Respectfully submitted,

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